IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Petitioners,

vs.

JOSEPH CARROLL, *et al.*,

Respondents.

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners,

vs.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONERS (PLAINTIFFS') BRIEF

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Opinions Below

The Opinion (App. 124) of the United States District Court for the Southern District of New York is reported at 241 F. Supp. 865. The majority and minority opinions (App. 180, 203) of the United States Court of Appeals for the Second Circuit are reported at 372 F. 2d 155.

Jurisdiction

Judgment of the Court of Appeals (Second Circuit) having been entered on January 30, 1967, Cross-Petitioners invoked jurisdiction under 28 U.S.C. § 1254 (1). The Order allowing certiorari was dated October 9, 1967.

Statement of the Case

1. *The Plaintiffs.* Somewhat inadequately, the plaintiffs are described in the District Court's opinion (App. 125-27). More comprehensive descriptions of the manner in which plaintiffs, like other professional orchestra leaders, conduct their businesses and professions appears in the opinions of the same District Court in *Cutler* v. *AFM*, 231 F. Supp. 845, affirmed 316 F. 2d 546 (2 Cir. 1963), certiorari denied 375 U. S. 941 (1963) and in *Carroll* v. *AFM*, 206 F. Supp. 462 (S.D.N.Y. 1962), affirmed 316 F. 2d 574 (2 Cir. 1963). As appears from these decisions and from the instant record, orchestra leaders like plaintiffs are employers, even though AFM and its Locals regard them as "employees" (Tr. 62-64, 353-86, 993, 1038-45) of the purchasers of music. They are businessmen (Tr. 150-151) who operate enterprises for profit in competition with other orchestra leaders. Although they are entrepreneurs, they are subject to Union rules (Tr. 8, 84) and practices (Tr. 277-278, 237-238, 58-60) which largely govern them, not merely as employers but as entrepreneurs, as will be demonstrated *infra* in the argument. But the leader is a businessman-employer who is distinguished from other such employers because his success is particularly dependent upon his own personality, skill, business acumen and showmanship (Tr. 150-151, 1026, 1030, 1034-1035, 1037-1038). The popularity of his orchestra depends upon his leadership, style and reputation and not upon any individual sideman, *i.e.*, instrumentalist employed by orchestra leader.

When the leader plays an instrument (as he usually does), he does not displace any sidemen. On the contrary, he thereby makes possible jobs for sidemen. Purchasers of music are utterly indifferent to the names and even reputations of sidemen, as the court found in *Cutler* v. *U. S.*, 180 F. Supp. at 362-63. Only the orchestra leader makes an investment in the orchestra's music library, music stands, uniforms, lighting equipment, sound systems, stationery and other paraphernalia. He alone assumes the risk of loss if the purchaser fails to pay after the engagement. The orchestra leader alone decides whether credit shall be extended. If he guesses wrong, the leader must nevertheless pay the wages of his sidemen (Plaintiffs' Exhibit 162, Article 13 § 29). The purchaser looks to the leader to perform the contract of engagement and not to any sidemen (*ibid.* Article 16 § 19). The leader hires his sidemen, disciplines or discharges them and exercises complete control as any employer, but he does so not only from an economic point of view but also from an artistic one (App. 7-8, 102).

Plaintiffs (and members of the class they represent) do not confine their activity and business to any particular types of orchestral engagements; although most of their business does derive from the single engagement field described below. They seek engagements and perform services wherever job opportunities, within their competence, exist. (App. 129-30; Tr. 1160; 2154-57, 2159-65, 2829-30, 3291-96).

The contrast between App. 102, ¶ (10),* and App. 126-27, § 11,* highlights the tremendous difference between

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* The Pretrial Order (App. 102) contains the following stipulation (10):

(10) The vast majority of members of defendant unions who act as orchestra leaders do not devote their full time to the profession of orchestra leader. They also serve as sidemen; they

(Footnote continued on following page)

professional orchestra leaders like plaintiffs and the "vast majority of members of defendant unions who act as orchestra leaders." Leaders like plaintiffs are small in number, less than 2% of AFM and Local membership. Compare, for example, Tr. 212 and 3661-62 with Tr. 3667. Max Arons, then Secretary and now President of Local 802, variously estimated that, out of six to ten thousand members who filed contracts as leaders, only 120 (on one estimate) or 2% (on another estimate) were professional orchestra leaders like plaintiffs, who never worked as sidemen (App. 130, ¶ 33; Tr. 3666-7; Plaintiffs' Exhibit 58).

Thus, the class represented by plaintiffs is very small by comparison with the members who, though usually sidemen, do nevertheless, occasionally and on an *ad hoc* basis, file engagement contracts as "orchestra leaders"; and who, thereupon, *improvise* (rather than *establish*) orchestras. The class asserted by plaintiff includes only *professional* orchestra leaders; that is to say, employers who derive their livelihoods from their profession and who never or

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(Footnote continued from preceding page)

maintain no office; they do not employ steady or part-time employees; they do not advertise; they do not use the same sidemen from one engagement to another; they do not use subleaders; they do not call for rehearsals or train their orchestras; and they do not furnish music, bandstands or uniforms. They are musicians who may lead today and may follow tomorrow.

By contrast, the Trial Court found (correctly but not fully) that:

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

very rarely work as sidemen, and then only to accommodate fellow leaders.

2. *The Defendants.* The defendants are adequately described in the pretrial order (App. 101) and in the District Court's opinion (App. 127-28).

The geographical area over which AFM exercises jurisdiction includes the entire United States, Canada, Puerto Rico, the Virgin Islands and the high seas (Plaintiffs' Exhibits 155-156, 348; Tr. 516). The geographical area over which Local 802 exercises jurisdiction comprises the five boroughs of the City of New York and Nassau and Suffolk Counties in New York. But in many respects AFM and Local bylaws are binding on members, wherever they travel (Tr. 266; 286-289) and even on AFM members from other States who visit Local 802's geographical area (Tr. 275; Plaintiffs' Exhibits 155, 156, 348).

Membership in a Local affiliated with AFM implies AFM membership (App. 101). Defendants are and claim to be *representatives* within the meaning of NLRA of both employee-musicians *and orchestra-leader-employers,* including plaintiffs (Tr. 2984-95).

Practically all orchestra leaders (except Carroll and Peterson who were erased as members after the instant actions were begun) and all sidemen in the United States are AFM members (Tr. 164-65; App. 102). Some orchestra leaders are members of two or more AFM Locals: e.g., Meyer Davis (Tr. 349 ff), Ruby Newman (Tr. 800 ff), Marty Ames (Tr. 931 ff), Stan Kenton (Tr. 1021 ff) and Si Zentner (Tr. 3505).

3. *The Musical Industry.* There is a wide variety of types of musical engagements (Tr. 28; Plaintiff's Exhibit 187, Index). These defendants have divided them into two classes: single engagements and steady engagements (App. 128, ¶ 24; Article 10, Exhibits 29, 165, 172; Article 15, Ex-

hibit CM). The total of single and steady engagements comprises all musical events in the United States according to Union categories. A single engagement is defined by the Local 802 Bylaws (Article 10, Exhibits 29, 165-172) as an engagement of less than one week or five days. A steady engagement is an engagement of five days or more (App. 101, ¶ 8; App. 128, ¶ 24). The complaints and the proof cover both single and steady engagements.

AFM has made a similar distinction between "traveling engagements" which are defined as "engagements of one week or more played by members outside the jurisdiction of their home Local and all tours of one week or more"; and "miscellaneous out-of-town [traveling] engagements" which are defined as "all engagements of less than one week played by members outside of the jurisdiction of their home Local" (Article 15 of Exhibits 161, 162, 163, 164, 164A, 164B and CM).

There is no legally, musically or factually significant difference between the function or activity of an orchestra leader in the single engagement field and his function or activity in the steady engagement field (Tr. 524-25, 578-79, 713-16, 864, 984, 1054-56, 1182-83, 1335-36, 2508, 3528-36).

4. *Club Dates.* The class of *single engagements* includes, and therefore is larger than, the class of *club dates* (Tr. 275, 350-51, 462, 539, 211, 559-60, 3841-42, 3886; Exhibits 187 and 366). Exhibit 365 (Tr. 3784) purports to be a Union tabulation of 48, 460 "club date single engagements" for the year 1961, nomenclature of which plaintiffs never heard prior to that year. A Union official testified that 55,000 contracts for musical engagements were filed with Local 802 in one year (Tr. 476). About 30 Local 802 delegates visit the locations of musical engagements to check on them (Tr. 3834). Sometime earlier (March, 1962) the number of such delegates was approximately 20 (476, 484-86).

The non-club date field includes all steady engagements and many single engagements (Tr. 3830-31, 3841). Steady engagements in the musical industry in the United States are rare and very small in number (Tr. 350-51, 2984-94, 3108-09, 3183-3230, 3241, 3582, 3659-60). Except for employee musicians working for professional orchestra leaders as first string or second string men, employment in the single engagement field is highly casual; it is often performed by persons whose primary source of income is derived from other occupations entirely outside of the field of musical entertainment (Tr. 3654, 3661, 3666-67, 3673). Local 802 in its own statistical tabulations (Exhibits J, L, M) admits that more than half of all "club date" engagements are played by less than 5% of Local 802 members. About 2% of Local 802 membership are full-time professional orchestra leaders (Tr. 1689-93). In other words, the bulk of all musical engagements and the largest part of income from such engagements comes from single engagements (Tr. 350-51, 3888).

The Index of the Local 802 Price List revised as of June, 1959 (Exhibits 187, 366) lists approximately 127 types of single engagements and 65 types of steady engagements. (It does not describe "club dates".) But that Price List booklet did not include (as it states on its cover) electrical transcriptions, motion picture recordings, steady opera, recordings, steady symphony work, television, theatre and wired music engagements. These are covered by other booklets published by AFM and Local 802.

5. *Booking Agents and Sidemen.* Many engagements are obtained for well-known leaders by means of the services of booking agents (Tr. 130, 555, 1022, 1039, 1042, 1083, 1101). Professional orchestra leaders are either internationally known, nationally known, regionally known, locally known or relatively unknown despite a genuine following which enables them to earn their livelihoods as leaders (Tr. 3540-44, 3566-67, 552-53, 794-96, 1093-96, 1118,

1269). The sideman who wants to break into the class of orchestra leaders has to do what most established orchestra leaders did in the past. He has to build up a following and a reputation by reason of his virtuosity, his business acumen, his personality, his capacity for leadership and his ability to stamp his orchestra with a style of performance that merits popularity.* Booking agents don't deal with sidemen (Tr. 528-531).

6. *Professional Orchestra Leaders Compared With Ad Hoc Leaders.* Orchestra leaders with national or international reputations (Tr. 2540-3544, 1071, 1086, 794-96, 1118) and orchestra leaders with regional reputations, extending across state lines (Tr. 3543, 3566-67, 444, 450, 794-96, 1118-1119, 1130-31) conduct their business and their orchestras in the same way (leaving aside such factors as are personal) as orchestra leaders who are only locally known and who do not regularly cross state lines (Tr. 984, 1076). They must be differentiated, however, from the vast majority of the eight to ten thousand members, who, according to Local 802 officials, filed contracts or reports of engagements with Local 802 for the year 1960 (Tr. 3667).

Leaders and sidemen are readily interchangeable in the vast majority of this number of 8,000-10,000. But sidemen are certainly not interchangeable with professional orchestra leaders having established businesses. Purchasers of music would and do reject such interchangeability. Even if they did not object, obviously no sideman-turned-leader *ad hoc* can suddenly put himself into the boots of an established *professional orchestra leader.* There is a definite group of AFM sidemen who are primarily sidemen and who make a profession of being sidemen and who derive their livelihood from performing as sidemen (Tr. 1205 ff, 1395 ff). Likewise, there is a small class of orchestra-

* See the recently published volume *"The Big Bands"* by George T. Simon which treats of the orchestra leaders (including plaintiff, Cutler) who were, and some of whom still are, at the top of their profession.

leader-employers who, like plaintiffs, have established businesses as such, who earn their livelihood from serving as leaders and who never or very rarely perform as subleaders or as sidemen, doing so only as an accommodation for a fellow leader: Meyer Davis (Tr. 3049 ff), Hank Thompson (Tr. 779 ff), Ruby Newman (Tr. 800 ff), Marty Ames (Tr. 937 ff), Stan Kenton (Tr. 1021 ff), Si Zentner (Tr. 3505 ff), and the plaintiffs. Honest sidemen recognize this (Tr. 304 ff, 487 ff). Union witnesses admitted (Tr. 3666-67) that no more than 2% of the membership of Local 802 comprises orchestra leaders who never perform as sidemen. At other times Union witnesses testified that the number ranged between 87 and 125 out of 30,000 (Plaintiffs' Exhibit 58, Tr. 3667).

Defendants' Exhibit L, with respect to Local 802, shows that during nine months of the year 1960, 118 members (professional orchestra leaders) performed 15,051 "club date" engagements. These 118 leaders constituted fourtenths of one percent of Local 802's 30,000 members and 1.7% of the 6,000 members who, as "orchestra leaders", filed engagement contracts in 1960 (Plaintiffs' Exhibits K, L, M; Tr. 3505 ff, 1021 ff, 401 ff).

In a few areas in the United States, such as New York, Boston and Chicago, some orchestra-leader-employers use *subleaders* to conduct orchestras playing engagements on behalf of the orchestra-leader-employer. Outside these few areas, subleaders are unknown. Some purchasers of music object to subleaders, wanting only the leadership of the reputed leader. Others are satisfied with subleaders, trained by the leader, whose orchestra has something of the leader's style. When an orchestra leader employs a subleader, he multiplies work opportunities for such employee-musicians. If the leader performs an engagement (because the client insists on the leader's presence), the leader does not *displace*, as the court below held, a subleader. He merely *does not hire one*. In leading his

orchestra, the leader thus performs an often non-delegable task. He discharges duties and performs work characteristic of his peculiar type of employer-businessman status, just as the president of a business corporation performs executive tasks. The enterprise could not fare well without the orchestra leader's work.

The market for musical engagements is indicated by the AFM bylaws, its lists of Locals and of booking agents (Plaintiffs' Exhibit 100). Orchestra leaders with established businesses frequently travel across State lines (Tr. 1021-91; 401-459; 349-401; 3505-71; 800-29; 3641-42; 3685-86; 1425; 2227; 2231). Travel by orchestras in both single and steady engagement fields is contemplated by defendant Unions, and is regulated in the AFM bylaws (Plaintiffs' Exhibit 162, Articles 16, 17, 19).

7. *The "Form B" Contract.* For both steady and single engagements defendant Unions require under Union penalties that the orchestra leader and his client execute a "Form B contract" (Defs. Ex. CM, Article 13, § 33). This form falsely designates the purchaser of the music as the "employer" of both the leader and the sidemen (Defs. Exh. Z-1 and 2; Tr. 1040-48; 2482-86). Between 50-75% of all the musical engagements in the United States are contracted for by use of this Form B contract (Tr. 660-90; 41-48; 202-10; 1003).

Neither the orchestra leader nor the purchaser usually reads or knows the terms and conditions printed in fine print on the AFM Form B contracts (Tr. 42-43; 1043; 1412; 2486; 3000). The intention of the parties when they sign the Form B contract as well as their conduct under such contracts are at variance with the language thereof (Tr. 1040-48; 669-70; 682; 1104-05; 1111; 1184-90; 1735-48; 2482-86; 3000). In most cases, leaders using the Form B contract do not list on the reverse side the names, social security numbers and wages of their sidemen (Tr. 682, Plaintiffs' Exhibit 227). The price of the engagement,

which is entered on the face of the Form B contract, states the *total price* (paid by the purchaser) as defined in the Price List booklet (Tr. 46-7, 669-70; 203). Combination with non-labor groups, price fixing, suppression of competition and other monopolistic practices are all furthered by widespread and repeated use of the Form B contract, because it incorporates by reference all AFM and Local bylaws and regulations.

8. *Defendant Unions and Collective Bargaining.* In the single engagement field and in large areas of the steady engagement field, defendant Unions do not bargain collectively with orchestra-leader-employers (Tr. 26; 252-53; 3262). Less than 2,500 members of the AFM are engaged in the steady engagement field (Tr. 2984-95; 3183; 3366, Plaintiffs' Exhibits 96, 121, 229, 261).

The total number of employee-musicians covered by collective bargaining agreements was never disclosed by defendant Unions, which claim (Tr. 2984 ff) that they have collective agreements as set forth in the Trial Court's Finding No. 124 (App. 153-155). However, these labor contracts cover only a small number of Union members; and much of the collective bargaining which defendants assert in the steady engagement field (Tr. 2984-2995) is mere pretense or fiction; because the Form B contract and its variant forms are constantly used in connection with the alleged collective agreements, and these dub the purchaser of the music as the "employer"; and because they often result from Union imposition rather than collective bargaining.

The collective agreement between AFM and the recording companies (BS) is applicable to a small and occasional staff of employees of the recording companies. But it is applied, by means of the Form B contract, to orchestra-leader-employers who had no hand in its negotiation: Meyer Davis (Tr. 349 ff); Hank Thompson (Tr. 401 ff); Stan Kenton (Tr. 1021 ff); Herb Zane (Tr. 1159); Si Zent-

ner (Tr. 3505 ff). By its terms, the "Hotel Contract" covers only hotel, restaurant and nightclub employees. But it is enforced against all orchestra-leader-employers who perform in such places; and they are required to use the Form B contract. Moreover, none of the alleged collective bargaining agreements defines a *bargaining unit*. The contract between Local 802 and the Shubert Brothers (Ex. DJ) is on its face a contract between a labor union and a landlord who is manifestly *not* the "employer" of any musicians.

9. *Employer Status of Orchestra Leader.* There is no Record proof that *in fact* orchestra leaders or conductors are *employees* (as distinguished from *employers, independent contractors* or *supervisors*) in: radio and television, the making of musical transcriptions, the making of TV films, performances at hotels, nightclubs and restaurants, despite the Trial Court's Findings.

Payments into the Local 802 Steady Engagement Welfare Fund (Tr. 3777; 2226; 2378; 3152) are made by persons, firms or corporations who are not "employers" of the involved musicians (See Exhibits 333, 334, 335 and 336 and Defendants' Exhibit LL). Thus, such payments are violative of § 302 of the Taft-Hartley Act of 1947.

That professional orchestra leaders are businessmen and *employers in a non-labor group* is clear from the uncontradicted testimony of:

(1) Sidemen: (a) *Charles McCarthy* (Tr. 309-322; 328-331; 337-339; 345-346); (b) *Ted Diamond* (Tr. 492-496; 501-502; 504-505; 523-524); (c) *Julius Schwartz* (Tr. 561-564); (d) *Marty Melfi* (Tr. 3861-3866).

(2) Orchestra Leaders (the asterisk indicates witnesses engaged in both single and steady engagement fields): (a) *Meyer Davis** (Tr. 352-355; 358-379; 383; 386a; 369-370; 392); (b) *Hank Thompson** (Tr. 410-522; 430-432; 434-436; 452-458); (c) *Marty Levitt** (Tr. 565-576; 623; 607-608; 612);

(d) *Jack Kahner** (Tr. 703-713; 829-830; 837a-845; 850-855; 858; 863-880); (e) *Emil Powell** (Tr. 734-740); (f) *Ruby Newman** (Tr. 811-817; 826-828); (g) *Marty Ames* (Tr. 933-943; 958-960; 965-966; 971-973); (h) *Matt Gillespie* (Tr. 979-983; 993); (i) *Stan Kenton** (Tr. 1026-1052; 1067-1070; 1079-1083; 1088-1089); (j) *Marty Beck* (Tr. 3161; 3166; 3168-3175; 3179-3180); (k) *Herb Zane** (Tr. 1163-1178; 1188-1189; 1198-1203); (l) *Charles Dickson** (Tr. 1213-1223; 1224-1228; 1229-1232; 1406; 1412); (m) *Herb Sherry* (Tr. 1295; 1300-1301; 1303-1305; 1307-1310; 1313; 1315-1318; 1322-1326; 1329-1332); (n) *Harry Lefcourt* (Tr. 1343; 1347-1350); (o) *Arthur Flatte* (& his brother) (Tr. 1359-1367; 1369; 1371-1373; 1383; 1388; 1392); (p) *Joseph B. Carroll* (Tr. 1444; 1934-1935; 1616; 1622; 1630; 1634-1641; 1836-1839; 1935); (q) *Burt Gross** (Tr. 1864-1869; 1873-1874; 1877-1888; 1891-1893; 1895-1897; 1899; 1902; 1905); (r) *George E. Seuffert* (Tr. 1911; 1913-1917; 1923); (s) *Ben Cutler** (Tr. 2229-2232; 2604-2609; 2616-2617; 2637; 2659; 2664; 2667; 2670); (t) *Charles Turecamo* (Tr. 2446); (u) *Marvin Kurz** (Tr. 1460-1463); (v) *Ray Cole** (Tr. 1572-1573); (w) *Karl Weiss* (Tr. 1605-1609); (x) *Charles Peterson** (Tr. 1737-1739; 1743-1748; 1950; 1963-1970; 1970-1973; 1986; 2063-2065); (y) *Eddie Wittstein* (Tr. 2483-2485; 2487-2488); (z) *Pat Dorn** (Tr. 2520-2521); (aa) *Roger Steele** (Tr. 2898; 2901-2910; 2913, 2915-2925); (bb) *Louis Kohuth** (Tr. 2963-2964; 2976-2981; 2974); (cc) *Tony Stevens** (Tr. 3047-3048; 3051; 3055; 3072-3074; 3079; 3086-3089; 3094-3097; 3099-3100; 3102); (dd) *Si Zentner** (Tr. 3514; 3519-3521; 3525-3533; 3536-3537; 3551-3553; 3561-3563); (ee) *Tony Cabot** (Tr. 3663-3665); (ff) *Ralph Martieri** (Tr. 1341-1342; (gg) *Lionel Hampton** (Tr. 1341-1342); (hh) *Art Farmer** (Tr. 2693-2695; 2702-2707).

(3) Booking Agents: (a) *Willard Alexander** (Tr. 531; 537; 541-542; 546-547; 552-553; 559-561); (b) *Joseph G. Glaser** (Tr. 1092-1097; 1114; 1116-1119; 1130-1133); (c) *Louis Riccardo* (Tr. 1002-1007); (d) *Howard Sinnot* (Tr. 2505-2507).

(4) Nightclub Operators (most of them using large numbers of orchestras annually): (a) *Oscar Goodstein** (Tr. 779-784; 787; 791-798); (b) *Joseph Termini** (Tr. 2222-2226; 2377); (c) *Plaintiffs' Exhibit 357;* Cafe Metropole Contracts* (Tr. 3686-3690; 2226); (d) *Benjamin Maksik** (Tr. 3120-3121; 3128; 3139-3141; 3144-3151; 3155-3157); (e) *Michael Gaynor* (Tr. 635-636; 638; 643-644; 654-655; 1138; 1142); (f) *Ralph Watkins* (Tr. 2940-2943; 2951-2953).

(5) Defendant Union Officials: (a) *Herman Kenin* (Tr. 141-143); (b) *Stanley Ballard* (Tr. 3429-3430); (c) *Alfred Manuti* (Tr. 258-260).

(6) Fair, Steel Pier, Circus Operator: (a) *George Hamid* (Tr. 2713-2716; 2727).

(7) A & R men and other witnesses who testified respecting Recordings: (a) *Robert Morgan* (Tr. 2782-2787; 2769-2771; 2778); (b) *Louis Teicher* (Tr. 2293-2294; 2297-2300; 2308-2309; 2320; 2324-2325); (c) *Bert Fisher* (Tr. 3853-3857); (d) *Herman Diaz* (Tr. 1470-1486; 1490-1492; 1530-1540).

(8) Hotelmen: (a) *Clyde Harris* (Tr. 892-894; 902-907; 917-920; 927-928; 930-931); (b) *Ferrer Rama* (Tr. 481-484).

(9) Union attorney, Mr. Dannett (Tr. 254, 355, 386a).

10. *Special aspects of the orchestra leader's status as employer.*

While the complaints in the instant cases, as well as plaintiffs' proof, covered both single and steady engagements, the Trial Court, for some inexplicable reason and without the slightest proof in the record, seemed to conclude that *in steady engagements,* the employer status of professional orchestra leaders was questionable and also that in some single engagements, such as recordings, they are "employees." Not only the proof in the record but common sense and the impartially dispensed information

contained in Mr. Simon's book, "*The Big Bands*", flatly contradicts these deviations from indisputable facts set forth in the Record.

After all, the only differentiation, self-servingly made by the defendant Unions, between single and steady engagements is *chronological*. Steady engagements last longer than single engagements. Why a professional orchestra leader, who is clearly an employer in a single engagement, should suddenly become an "employee" in the steady engagement is utterly inexplicable. Likewise, it would be difficult to assign a reason for saying that Guy Lombardo or Benny Goodman, who are unquestionably employers and professional orchestra leaders, should lose that status when one of the big recording companies asks them to make a record of the very same music played by them on single engagements. Shuttlecock shifting of the employer status of the same orchestra leader, simply because an engagement is five days rather than four days, simply does not make sense.

The treatment given to the "big bands" and their leaders, after whom the bands are named, by George T. Simon in his recent book "*The Big Bands*", quoted below, indicates that the 400 listed and described orchestra leaders are employer-businessmen, whether they play single engagements or steady engagements; and whether they make recordings, play on television or perform for radio. If it be objected that the plaintiffs, according to Judge Levet, are not "big bands" in the sense implied and defined by Mr. Simon, the latter himself furnished the answer by including plaintiff Ben Cutler in his 400, as well as the following plaintiffs' witnesses: Lionel Hampton, Si Zentner, Stan Kenton, Ruby Newman, Meyer Davis and Art Farmer. Moreover, many plaintiff witnesses described the performances of dozens of the famous orchestra leaders, given longer or shorter treatment in Simon's book. It is

significant that *defendant Unions at no time produced as a witness or described any orchestra leader* in the class treated in *"The Big Bands"*. At no time did any Union witness describe the operations of a band leader mentioned in Simon's book to show that band leader's lack of employer status in either single or steady engagements or on recordings or performances on radio and television. The only exception was Guy Lombardo, whom Mr. Arons, during the 1962 trial, attempted to convert into an "employee" of the Roosevelt Hotel, where he had been playing steady engagements. Plaintiffs immediately subpoenaed a witness from the Roosevelt Hotel. That witness testified that Guy Lombardo and his orchestra were not employees of the Hotel and were not on its payroll. The Hotel paid Lombardo $6,000 per week, out of which he paid all his expenses, including the wages of his sidemen. The Hotel had nothing whatever to do with the sidemen and did not even know the wages paid by Lombardo to his sidemen. See Tr. 3429.

Plaintiffs' witnesses did testify that there was absolutely no difference in the role of an orchestra leader when he played a single engagement (which includes recordings, TV appearances and radio appearances) and steady engagements (Tr. 524-25, 1335-36, 3528, 3536).

"The Big Bands" has this to say about recordings in its chapter on that subject (*passim*, pp. 51-54):

> "Records were important to the big bands—but not so greatly important as they are to today's musical groups, who without echo chambers and other electronic trappings would be completely uncommunicative. * * *
>
> "The musicians in the big bands differed from those of most of the popular recording groups of the sixties. They were not kids dependent primarily upon three chords and a smart engineer, but real musicians who

had spent years studying music and mastering their instruments * * *.

* * *

"In addition, what went into a record came out exactly the same way, with no souped-up electronic gimmicks. * * *

* * *

"A band's name power, as well as its interpretation of a song, helped create big hits. * * *

"Most bands were impressed with the promotional value of recordings, but a couple of top leaders had little use for them. * * *

"But the man who seemed to recognize even less the importance of recordings to the big bands was the most influential man on the entire big band scene, James Caesar Petrillo. Elected national president of the American Federation of Musicians in June, 1940, and perturbed by the possible adverse effects of recording on his membership, he hired Ben Selvin, a highly respected recording executive and orchestra leader, to conduct a thorough study of the entire recording field as it affected musicians.

"Selvin's report was exhaustive. Presented at the annual convention of the musicians' union, it received a standing ovation from the delegates. Estimating that by the end of 1941 the recording industry would have paid out more than three million dollars to working musicians, Selvin recommended that 'it would be unwise, if at all possible, to curtail industries where such large amounts are spent for musicians. There are remedies for the unemployment caused by this mechanization of music, but a knockout blow, which could not be delivered, is not the answer.'.

"So what did Petrillo do? On August 1, 1942, he tried for a knockout—he ordered his musicians to stop all recording. His argument was simple but specious. If the record companies couldn't devise some system

whereby musicians were paid for the use of their recordings on radio programs and in juke-boxes, then he wouldn't let them record at all. The big band leaders almost to a man disagreed violently with Petrillo's actions. They recognized far better than he the importance of records to their future. But James Caesar stuck dictatorially to his battle plan.

"For more than a year no major company made any records with instrumentalists. They did record singers, however, usually with choral backgrounds. Finally in September, 1943, Decca signed a new contract with the union. A month later, Capitol followed suit. But the companies with most of the big name bands, Columbia and Victor, fought for more than a year longer.

"It was a mess. Late in 1943 the War Labor Board (WLB) was asked to help. Four months later, finding in favor of the recording companies, it recommended that the strike be ended and 'conditions prevailing on July 31, 1942, be restored'. But Petrillo refused to accept the recommendation. Even President Roosevelt got into the act, requesting an end to the strike. Again Petrillo said no. Finally in November, 1944, Columbia and Victor capitulated and agreed to pay the union a royalty for all records released.

"Petrillo was jubilant. He claimed 'the greatest victory for labor . . . in the history of the labor movement' In a way he may have been right. The rank-and-file membership, two-thirds of whom, according to the WLB report, did not depend upon music for a livelihood, had won a victory. As for the knockout blow that the Selvin report had predicted couldn't be delivered—well, it may not have been a knockout, but it certainly was a knockdown. Unfortunately, it didn't hit the recording companies nearly as hard as it hit the big bands. And then, when the bands finally did get up from the floor, after a long count of two years

and two months, they found that they were no longer champions of the recording field. While they had been down, the singers had taken over, and the recording field would never again be the same for the big bands."

The foregoing quotation, though lengthy, is important. It shows not only that Union interference seriously hurt the bands of professional orchestra leaders but that there never was any change in the *employer status* of professional orchestra leaders, when they took their bands to recording studios to make records. The identity of the big band was not lost or altered because, as defendant Unions erroneously aver, the big band was subjected to the domination and control of an A&R man [*infra*]. It was the band's name and its interpretation, for which the leader alone was responsible, which created record hits. Where the latter included new interpretations of old, standard songs, "usually the band leaders [said Simon] came up with the idea of resurrecting such old standards. Sometimes they met with strenuous objections from the record company artists and repertoire (A&R) men who were under constant pressures from their sponsors to record 'sure hits', and from music publishers who constantly kept assuring them that their particular tunes were those 'sure hits'. It's gratifying to those of us who were constantly fighting for higher musical standards that the big band record hits that have survived have almost always been those which the bands, not businessmen, dug up and fought to get on wax * * *" (p. 52).

For obvious reasons, recording companies were not interested in recordings from untrained, improvised bands, gotten together *ad hoc* by sidemen-turned-orchestra-leaders. Indeed, the record is so conclusive on this subject, that one is left wondering how the Trial Court could, upon the basis of record evidence, have concluded that orchestra leaders and their sidemen, when making recordings, are the "employees" of the recording company. For example,

Fisher, a former employee of Local 802, testified that he was in its recording department for three or four years (Tr. 3846); and that he was present at thousands of recording sessions (Tr. 3853). From the vantage point of that experience, he said that the orchestra leader was always in control of the orchestra, and not the A & R man, during the recording sessions (Tr. 3857). AFM President Kenin testified that the recording company is the purchaser of the music (Tr. 63-64) and that all recording companies are treated the same (Tr. 135). Sideman McCarty testified that he was an employee of orchestra leader Ben Ludlow when the latter made recordings (Tr. 339). Meyer Davis testified, as a professional orchestra leader, that when he made recordings or appeared on TV and radio he was the employer of his sidemen (Tr. 375-77, 392). Orchestra leader Herb Zane's recording procedure reveals that he too was the employer during recordings (Tr. 1198-1203). Orchestra leader Stan Kenton testified that his recording contract did not give the recording company the final say (Tr. 1080); and that no A & R man ever rejected or controlled his recording (Tr. 1079). His recording procedure shows that he was the employer at all times (Tr. 1059-65). Without telling him why, Capitol abandoned the lump-sum agreement (Tr. 1089), obviously at the instance of AFM. In any event, Capitol, in paying employer deductions at the bidding of the Union, never failed to subtract these deductions from Kenton's royalties (Tr. 1067). Hank Thompson's recording experience was exactly the same (Tr. 415-16, 420-22, 430-32). Orchestra leader Si Zentner also was employer during recordings (Tr. 3512, 3526, 3551, 3563-64). So was orchestra leader Art Farmer (Tr. 2699-2700). Union official Arons described how the recording companies obeyed Union dictation in these matters (Tr. 3596-97), even though those recording companies were obviously not employers of the orchestra leader and his sidemen. A & R man Diaz (Tr. 1465) is not even able to read music (Tr. 1479). He testi-

fied how large companies capitulate to the Union, obligingly paying the wages of sidemen to the Union itself (Tr. 1533, 1491-92, 1527). He admitted that the instrumentation of an orchestra is matter of agreement between the orchestra leader and the recording company (Tr. 1518-19). He also admitted that the amounts of wages of sidemen paid to the Union are deducted from the royalties paid by the recording companies to the orchestra leader (Tr. 1536-42). There is a difference between a dance band led by an orchestra leader, and an orchestra actually *in the employ of some famous vocalist* (Tr. 1533-34). No plaintiff and no orchestra leader in the class of the plaintiffs is an employee of any vocalist. A & R man Morgan (Tr. 2752), called by defendants, admitted that he does not have sole control (Tr. 2769-71). Some 80-85% of the recordings are by vocalists and their own orchestras, 10% are transcriptions, made by either vocalists or professional orchestra leaders and 3-5% are big name bands, led by professional orchestra leaders (Tr. 2778-79, 2787). Recording company official Tiecher testified that no staff musicians are today employed in the phonograph industry by the recording companies themselves (Tr. 2308).

(11) *Leaders and their Bands as appraised by Simon.* Within the last month the Macmillan Company, New York, and Collier-Macmillan Limited, London, published *"The Big Bands"*, by George T. Simon, Editor of Metronome, the country's oldest and most respected music magazine. There he describes some 400 big bands, many of which were nationally and internationally known. He devotes a chapter to "The Leaders" (pp. 8-10) of whom he says:

> "Some were completely devoted to music, others entirely to the money it could bring.
>
> "Some possessed great musical talent; others possessed none.
>
> "Some really loved people; others merely use them.

"Some were extremely daring; others were stogily conservative.

"Some were motivated more by their emotions, others by a carefully calculated course of action.

• • •

"At the other end of the bandleading scale were those not nearly wise or calculating enough to realize that they never should have become bandleaders in the first place. Among these were some of the most talented and colorful musicians on the scene, to whom the music business meant all music and no business. Their lives were undisciplined and so were their bands. They swung just for the present, for a present filled with loads of laughs and little acceptance of their responsibilities as leaders. Unfortunately, almost all of this last group wound up as bandleading failures. For no matter what they would have liked to to believe, leading a band was definitely a business, a very competitive, complex business consisting of almost continuous contracts—and often difficult and crucial compromises—with a wide variety of people on whom not merely the success but the very life of a dance band depended.

"The leaders were called on to deal daily and directly—and not only on a musical but also on a personal basis—with their musicians, their vocalists and their arrangers, directing and supervising and bearing the responsibilities of each of these groups. But that wasn't all. For their survival also depended a great deal on how well they dealt with all kinds of people outside their bands—with personal managers, with booking agents, with ballroom, nightclub and hotel-room operators, with headwaiters and waiters and busboys, with bus drivers, with band boys, with the press, with publicity men, with music publishers, with all the various people from the radio stations and from the record companies and, of course, at all times and in all

places—and no matter how tired or in what mood a leader might be—with the ever-present, ever-pressuring public."

Beginning at page 5 of *"The Big Bands"*, Simon wrote:

"Why were some [orchestras] so much more successful than others? Discounting the obvious commercial considerations, such as financial support, personal managers, booking offices, recordings, radio exposure and press agents, four other factors were of paramount importance.

"There was, of course, the band's musical style. This varied radically from band to band. * * * Each band depended upon its own particular style, its own identifiable sound, for general, partial or just meager acceptance. In many ways, the whole business was like a style show—if the public latched on to what you were displaying, you had a good chance of success. * * *

"Generally it was the band's musical director, either its arranger or its leader or perhaps both who established a style. * * *

"Secondly, the musicians within a band, its sidemen, played important roles. Their ability to play the arrangements was, naturally, vitally important. * * *

"But the musicians were important in other ways too. Their attitude and cooperation could make or break a band. If they liked or respected a leader, they would work hard to help him achieve his goals. * * * The more musical the band and the style, the greater, generally speaking, the cooperation of the musicians in all matters—personal as well as musical

"Thirdly, the singers—or the band vocalists, as they were generally called * * *. A good deal depended upon how much a leader needed to or was willing to feature a vocalist. * * *

* * *

"But of all of the factors involved in the success of a dance band—the business affairs, the musical style, the arrangers, the sidemen and the vocalists—nothing equaled in importance the part played by the leaders themselves. For in each band it was the leader who assumed the most vital and most responsible role. Around him revolved the music, the musicians, the vocalists, the arrangers and all the commercial factors involved in running a band, and it was up to him to take these component parts and with them achieve success, mediocrity or failure."

The unbiased appraisal of an impartial expert thus certifies, based on long experience, the role and function of the successful professional orchestra leader.

12. *The leader's modes of leading.* The manner in which the personality of the leader, and the training he gives to his sidemen, are impressed upon an orchestra appears from the following interesting episode from the life of orchestra leader Count Basie, as told by George T. Simon (*"The Big Bands,"* p. 85):

"The importance of the drummer has been stressed by Basie. 'You may think you're the boss,' he once said, 'but that drummer is *really* the head man. When he's not feeling right, nothing is going to sound good.'

"Drummers certainly can inspire bands to do things they never did before. This actually happened with the Basie band one time when it was playing at the Palladium in Hollywood. Jones had been taken ill, so Basie asked Buddy Rich to fill in for the evening. Buddy, when he feels like playing, is undoubtedly the most inspiring drummer in the world, and as any musician would, he was thrilled at the opportunity of working with the Basie band. According to those who were there that night, the men performed brilliantly. As the Count reported some time later, 'We asked

Buddy to play again the next night. And you know what happened? The entire band showed up *early* for work. Now, you know that was just about unheard of in that band.'

"Even though Basie credits the drummer with being 'head man', don't let him fool you. Basie is strictly in charge at all times. This may not be obvious to those on the outside, though if they watch the band long enough, they'll realize that all the directions come from little, subtle motions from the Count at the piano. He may shrug his shoulders in a certain way to give a specific warning to the drummer. He may cock his head at a special angle to tell the entire band to come way down in volume. Or he may hit just one key to cue the ensemble into a rousing, roaring finale." (*ibid.*, 85-7)

13. *The leader in relation to his sidemen.* Frank Sinatra wrote the foreword to *"The Big Bands"*. In it he stated:

"Whether you were an instrumentalist or a vocalist, working in a band was an important part of growing up, musically and as a human being. It was a career builder, a seat of learning, a sort of cross-country college that taught you about collaboration, brotherhood and sharing rough times. * * *

"I've said this many times, but it can never be said too often: a singer can learn, should learn, by listening to musicians. My greatest teacher was not a vocal coach, not the work of other singers, but the way Tommy Dorsey breathed and phrased on the trombone." (p. ix)

There is a typical or representative manner in which every employer-businessman operates. That mode will of course be different from industry to industry. But on that mode depends the employer's ability to prosper his business. For an orchestra leader to obtain engagements from

the public, and thus to provide jobs for his sidemen and subleaders (in the few areas where subleaders are known), the leader *must* perform and *must be able* to perform in the mode peculiar to orchestra-leader-entrepreneurs. To prevent him from doing this is not only to rob him of his career but to deprive employee-musicians of their work. As Mr. Simon put it in "*The Big Bands*" (p. 8), for some orchestra leaders, "leading a band was primarily an art; for others, it was basically a science." To interfere with that art by labor union or any other intrusion, to limit the growth of that science by meddlesome regulations, to cramp the artistic style of the leader, whether he plays an instrument or not, must in the long run spell catastrophe not only for the leader and his popularity but also for his employee-musicians. The latter, on loss of popularity gained by the leader acting in the manner characteristic of orchestra leaders, would lose their jobs. Just as the ordinary businessman or executive in each industry has an approach of his own, usually tested by time and experience, so too do orchestra-leader-entrepreneurs. "Their approaches varied with their personalities and their talents" wrote Mr. Simon (*ibid.*, p. 8), who continues: "Highly dedicated and equally ambitious musicians like Glen Miller, Benny Goodman, Artie Shaw and Tommy Dorsey approached their jobs with a rare combination of idealism and realism. Well trained and well disciplined, they knew what they wanted, and they knew how to get it. Keenly aware of the commercial competition, they drove themselves and their men relentlessly, for only through achieving perfection, or the closest possible state to it, could they see themselves realizing their musical and commercial goals.

"Others, equally dedicated to high musical standards but less blatantly devoted to ruling the roost, worked in a more relaxed manner. Leaders like Woody Herman, Les Brown, Duke Ellington, Gene Krupa, Count Basie, Harry James, Claude Thornhill and Jimmy Dorsey pressured their men less. 'You guys are pros,' was their attitude,

'so as long as you produce, you've got nothing to worry about.' Their bands may have had a little less machine-like proficiency, but they swung easily and created good musical and commercial sounds.

"Other leaders, often less musically endowed and less idealistically inclined, approached their jobs more from a businessman's point of view. For them music seemed to be less an art and more a product to be colorfully packaged and cleverly promoted. The most successful of such leaders, bright men like Guy Lombardo, Kay Kyser, Sammy Kaye, Horace Heidt, Shep Fields, Wayne King and Lawrence Welk, were masters at creating distinctive though hardly distinguished musical styles; men respected more for commercial cunning than for artistic creativity. They might have been faulted by *Metronome* and *Down Beat* but never by *The Wall Street Journal*."

14. *Booking Agents and Leader-Employers.* The Union booking agent system is established by Article 25, AFM Bylaws (Plaintiffs' Ex. 162). That Article is enforced as written (Tr. 25-6, 3400). All active leaders use the services of booking agents at least from time to time (Tr. 130, 419-21). Orchestra leaders are required by AFM to use only those booking agents who are licensed by AFM (Tr. 131-32, 2503, 3374). Local 802 sends its official journal, *"Allegro"*, to all booking agents to keep them informed about Union standards (Tr. 1238). Article 25 permits AFM to withdraw the license for any reason or no reason at all and without notice. That, of course, would ruin the booker's business, which is considerable (Tr. 527-29, 556, 1097-98).

Moreover, booking agents are required by Article 25 AFM-licensed and their own licenses to adhere to union prices, wages and minimums in booking engagements. As a result, they always comply with AFM rules, thus combining with defendant Unions (Tr. 998; 532-33, 1102, 1133). Booking agent Sinnott refused to book Peterson after he was expelled (Tr. 2007). AFM fixes the maximum com-

pensation for booking agents (Tr. 546-47). Orchestras constitute a large part of the business of booking agents. For example, Willard Alexander, one of the largest booking agents in the country, testified that 90% of his attractions are orchestras. The Secretary of AFM, Stanley Vallard, testified: "The booking agent must, when he books an orchestra, book them at no less than Union scale * * *" (Tr. 3432). In the Union jargon, "Union scale" includes Union minimum prices.

15. *The Big Bands yesterday and today.* Professional orchestra leaders must, of course, have some following in order to live by their professions. As of any given moment, they can be internationally known, nationally known, regionally known, locally known and relatively unknown (Tr. 3540-44, 3566-67, 552-53, 794-96, 1093-96, 1118-1269). George Simon's "The Big Bands" purports to be a "report of the big bands during their greatest years—from 1935-1946" (Preface, p. xii). In those days, "big bands" meant orchestras of ten men or more, according to Sinatra's Foreward to this book (p. viii). Though the number of big bands in that sense has decreased considerably since 1946 (Tr. 1086), success as an orchestra leader or as an orchestra depends on operations like those of the big bands which performed between 1935-46 (Tr. 1055-1056). Professional leaders like plaintiffs today function exactly as did the leaders of the big bands; except that the number in the orchestra has been reduced, and perhaps some of the glamour has tarnished. Indeed, many of the 72 big bands whose leaders are described in detail by Simon (pp. 75-452) still carry on; such as Count Basie, Les Brown, Bob Crosby, Xavier Cugat, Dizzy Gillespie, Benny Goodman, Lionel Hampton, Woody Herman, Sammy Kaye, Stan Kenton, Wayne King, Gene Krupa, Guy Lombardo, Ben Cutler and many others.

No matter how great the reputation of an orchestra leader, it had to be elaborated by hard work over a period

of time. It was not an inheritance or a gift. It was not born in full panoply. Most of the leaders started as sidemen. The method of operation which brought them to eminence in their field, they continued after they obtained that eminence. They were never mistaken for sidemen; and no sideman was ever mistaken for an established leader. Most of the leaders played an instrument. Indeed, that was often the key to their success. Simon in Part III of "The Big Bands" lists more than 300 leaders, dividing them into classes such as the following: the arranging leaders (p. 459 ff), the horn-playing leaders (p. 465 ff), the reed-playing leaders (p. 475 ff), the piano-playing leaders (p. 480 ff), the violin-playing leaders (p. 485 ff), the singing-leaders (p. 487 ff).

16. *The different interests of leaders and sidemen; their "competition".* Ted Diamond, a professional sideman, testified that leaders have a different outlook from sideman (Tr. 508). The man who is now President of Local 802 testified (Tr. 3657-59) that the interest of leaders is not compatible with the interest of sidemen. Sidemen always want more wages (Tr. 3660). If sidemen are dissatisfied with the wages being paid in the 400 to 500 "Class C" establishments in the New York City area, Local 802 sends down a business agent to raise the wage scale (Tr. 3498). The IBM cards maintained by Local 802 distinguish between leaders and sidemen (Tr. 3823) but not between professional leaders and the vast majority of those who file contracts as orchestra leaders on a few, random occasions per year. However, Mr. Arons though stating that there were 30,000 potential leaders in his Union (Tr. 212) admitted that leaders like plaintiff Cutler were only about 2% of the membership (Tr. 3666-67). He added that this 2% "competes" with the remaining 98% of the members. He meant that they competed for jobs *as leaders*. In other words, 98% of the 30,000 members of Local 802, according to Arons' hyperbole, are all looking for jobs *as orchestra*

leaders. Even if this were literally true, that would only mean that they *as "leaders"* are "competing" with the professional orchestra leaders.

Orchestra leaders, too, feel that there is diversity of interests between leaders and sidemen, because the leaders are minorities in their Locals (Tr. 2497) and because sidemen therefore get what they want at Union Price List meetings (Tr. 2498). With obvious exaggeration, Arons testified that the "overwhelming majority who do club dates as leaders" have an interest in raising the wages of sidemen: "* * * Their interest would be to pay more money because they also act as sidemen" (Tr. 3659-60)! That statement may or may not be true of *ad hoc* "orchestra leaders", who occasionally improvise orchestras. It is certainly not true of *professional* orchestra-leader-employers. On its face it is incredible as to them. Arons had earlier testified that he was an "orchestra leader" *whenever he got a job or engagement to perform as such* (Tr. 224). That, obviously, did not make him a *professional* orchestra leader with an established clientele. Nor did it put him in the class of those who could effectively or meaningfully compete with plaintiffs as established professional orchestra leaders. The "competition" in such case would have to be between an established leader and a would-be leader. Arons incredibly testified that Max Sontag competed with Ben Cutler (Tr. 3667), something which Cutler himself denied (Tr. 2567-68). Arons figured out that there were about 120 musicians, out of the 6,000 who had filed contracts as leaders who were in the class of Cutler (Tr. 3667). The 120, being in the class of Cutler, never perform as sidemen. A typical example of a professional sideman (Tr. 331-39) who occasionally acts as a leader (Tr. 324) or as a subleader (Tr. 327) is Charles McCarty (Tr. 304 ff). Clearly, when McCarty turns from his profession as sideman in an endeavor to obtain and file a contract as a leader, he is "competing" with professional orchestra leaders not as a sideman but *as a leader.* This might cause a problem for professional

orchestra leaders (Tr. 1950-51). It should be no concern of a union. See Supplement.

17. *Decrease in musicians' jobs.* Precisely because the Unions made many entrepreneurial interests their own concern, the Union membership has remained stagnant and without any increase from 1953-1963 (Tr. 3270). Staff men employed on radio and television decreased ever since 1954 (Tr. 2300-02). Although there are some 4,000 radio stations and about 1,000 TV stations there is practically no live music on radio today (Tr. 3579, 3581, 3583-86). AFM has lost men in the radio and television field (Tr. 181-82).

18. *No competition between leaders below Union standards.* The Union price-fixing lists and booklets are so well enforced that no competition exists at prices below Union minimum prices (Tr. 2567-2568, 3653-55). The Union minimums are expressly designed to prevent competition (Tr. 3240). There is competition among orchestra leaders as such (Tr. 89-90) but not at prices below the Union's minimum prices (Tr. 389, 3652). Some leaders, in combination with the Unions, want to see the engagement prices raised, "because it helps them to negotiate. The higher the scale fixed by the Union the more the leader gets. That's the gist of it". So testified the Local 802 Treasurer, Hy Jaffe (Tr. 1253-54). The Union undertakes to supervise competition (Tr. 3725) between leaders. It even tried to regulate competition between the Americana Hotel and the Waldorf Astoria Hotel (Tr. 3244-45). Its supervision results in prevention of competition (Tr. 3727-28).

In addition to regulating and supervising price competition, the Unions engage in the regulation of competition in order to keep Local engagements for leaders and jobs for sidemen (Tr. 281). Another method of interfering with and restraining competition is embodied in the Unon rule that a member on a steady engagement may not in some cases during that engagement, play a single engagement

(Tr. 3318-20). There is a bylaw which forbids traveling orchestras from competing with local orchestras when they come into New York City (Tr. 146). The Unions regulate competition between orchestra-leader-entrepreneuers by making certain prices mandatory upon a leader-employer who belongs to one Union and different, lower prices become optional when the leader-employer belongs to two or more Unions (Tr. 748 ff, 2472-75; App. 93 ff).

19. *Leader bidding against sidemen.* Peterson testified that he never bid for an engagement against a sideman or subleader (Tr. 1976). Actually, he could not possibly do so; because sidemen and subleaders *as such* never bid for engagement contracts. They are never permitted by Union rules to file an engagement contract for Union approval *as a sideman or a subleader.* They can file contracts only as leaders. Peterson knew of no bids against him by *any sideman* (Tr. 2154), by which he must have meant any sideman-turned-leader for the occasion. See Supplement at end of this brief, *passim.*

Orchestra leader Dorn never bid for a job against a sideman either (Tr. 2510-11). Plaintiff Carroll never bid against any except reputed professional leaders (Tr. 1801 ff). Plaintiff Cutler never bid against Max Sontag who is regularly a sideman, but only against professional orchestra leaders (Tr. 2567-68). Steele (called by defendants), who is sometimes a sideman and sometimes a leader, mistakenly testified that he bid against Cutler (Tr. 2894). Cutler denied this. In any event, Steele could only bid against Cutler *qua* leader and not *qua* sideman or subleader. Likewise, Cutler denied that he ever bid against Tony Stevens (called by defendants), who is sometimes a leader and sometimes a sideman (Tr. 3871-72). While Cutler does not know who bids against him when he seeks engagement contracts, he is convinced that from time to time he has lost jobs to sidemen, i.e., sidemen-turned-leaders (because it is impossible, even under Union rules, for a leader to lose an engagement contract to a

sideman or to a subleader) (Tr. 2553). He corrected his testimony by saying that he doesn't know if he ever bid against any sideman (turned-leader) (Tr. 2566-67); and he doubted that he ever lost a bid to a sideman (Tr. 2570-71). His doubt is based upon the fact that his standing in his profession, as an established professional orchestra leader (included in the 400 "Big Bands", written by George T. Simon), would suggest that nobody looking to Cutler for an orchestra engagement would entrust a sideman with such an assignment.

Questions Presented

1. Whether defendant-Unions violated Federal antitrust laws by combining with non-labor groups (many classes of employers and businessmen, *e.g.*, orchestra-leader-employers who comply with defendants' bylaws, many hotels, nightclubs, restaurants, caterers, booking agents, theatre owners, dance-hall operators, recording companies, radio stations, TV stations and others) for the *purpose* or with the *effect* of (i) fixing prices, (ii) eliminating or suppressing competition and restraining trade, (iii) imposing unreasonable restraints on interstate commerce, and (iv) engaging in numerous monopolistic practices in the field of musical entertainment in the United States?[1]

2. Whether certain Union practices, enforced or maintained by defendant-unions in combination with non-labor groups (namely, such Union practices as unilateral establishment and imposition of wage scales, closed shops, minimum employment quotas, etc.) constitute antitrust law violations, even though, without combination with non-

[1] This is the first question presented by cross-petitioners' Brief in Opposition to Petition for Certiorari, page 2. The question as stated above includes, pursuant to this Court's Rule 40(1)(d)(1), a number of "subsidiary" questions fairly comprised therein. These subsidiary questions are spelled out in the cross-petition (p. 2, ff) by a number of questions there presented, namely, those numbered 2, 3, 4, 5, 6 and 20.

labor groups, they might also be unfair labor practices under the NLRA?[2]

3. Since application of the Sherman Act "involved the balancing of conflicting Congressional policies", as the Court below said, can the Norris-LaGuardia Act be said to take *all* "labor disputes" outside the reach of the Sherman Act, thus indiscriminately providing unions with a blanket exception, or only *some* disputes, *i.e.*, those where the union (unlike the Unions here involved) does not *combine with non-labor groups* to fix prices, suppress competition, and to impose other commercial restraints?[3]

4. Whether defendant-petitioners' bylaw and practice, requiring all leader-employers to use the "Form B" contract, which was unilaterally prepared by AFM and was and is enforced in combination with non-labor groups, violates the antitrust laws not only because said contract is a tool for price-fixing but also because it is itself an important means for effectuating defendant-unions' other monopolistic practices in combination with non-labor groups?

5. Whether defendant-petitioners' unilateral establishment, by bylaws obligating leader-employers, of numerous travel restrictions and their enforcement in combination with non-labor groups, cumulatively constitute unreasonable burdens on interstate commerce?

6. Whether the bald, unsupported statement by defendant-unions and by the Trial Court that plaintiffs engage in "job competition" with Union employee-musicians justifies

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[2] This question was question numbered 7 in the cross-petition (p. 3) and it includes the following subsidiary questions printed in the cross-petition (pp. 3-5): questions numbered 8, 9, 10, 11, 12 and 19.

[3] This question was numbered 15 in the cross-petition (p. 5) and it includes a number of subsidiary questions: namely, questions 13, 14, 16, 17, 18 and 26 presented in the cross-petition (pp. 4-7).

the statement of the Court below that employers like plaintiffs are "proper subjects for union membership"?[4]

7. Is there a class of *professional orchestra-leader-employers* within the meaning of Rule 23 FRCP, despite the fact that some leader-employers prefer and are benefited by the Union's price-fixing and other monopolistic practices in combination with non-labor groups; and should any court take cognizance of such a preference for law-breaking?

Statutes Involved

(1) *Sherman Antitrust Act.* Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U.S.C.A. §§ 1-7, as amended.

"Sec 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

(2) *Clayton Act.* Act of October 15, 1914, c. 323, 38 Stat. 730, as amended.

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

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[4] This question was question numbered 23 in the cross-petition (p. 7) and it includes the following subsidiary questions numbered 24 and 25 of the cross-petition (p. 7).

Summary of Argument

1. Defendant Unions violated the antitrust laws *by combining with non-labor groups for the purpose or with the effect of*: fixing prices, eliminating or suppressing competition, imposing unreasonable restraints on interstate commerce and engaging in many other practices which constitute unlawful monopolistic practices. These latter include, among many others, the unilateral imposition of minimum-employment-quotas, a multitude of unreasonable interferences with the businesses of orchestra-leader-employers, bylaws which suppress competition and restrain trade, universal imposition of the "Form B" contract and its substitutes, use of a system of licensing booking agents, and a spurious "arbitration" procedure under Article 9, AFM Bylaws.

AFM and Local contract provisions and their bylaws constitute two most important forms of union *combination* with non-labor groups. Other combinations are by tacit arrangement as, for example, in the catering industry. Professional leader-employers, booking agents, hotels, nightclubs, restaurants are all employer-entrepreneurs. As such, they may not properly be placed in any *labor group*. The fact that many Union members occasionally call themselves "orchestra leaders" and improvise as such on an *ad hoc* basis, does not derogate from the status and rights of the relatively small group or class of active, professional orchestra leaders represented by plaintiffs. Such leader-employers are businessmen who derive their livelihoods from their professions as orchestra leaders and who never or very rarely perform as sidemen (and then only to accommodate a fellow leader). They do not compete with sidemen for the latters' jobs. Sidemen do not compete, significantly or meaningfully, with them for engagements; and if they did, such competition is not something to be regulated by unions in combination with leader-employers.

2. The fact that certain of the Union activities challenged by plaintiffs are or might be NLRA *unfair labor practices* does not detract from the further fact that, *when they are performed in combination with non-labor groups,* they are, because by their very natures they exhibit exercise of monopoly power, also violations of the Sherman Act; especially when they are considered with accompanying union activities which are purely antitrust law violations.

By this contention, cross-petitioners seek to establish that said Union conduct must be regarded as antitrust law violations without preliminary NLRB decision as to possibly involved unfair labor practices, which (as such) have nothing to do with the involved combination with non-labor groups. Union violations of the national labor policy constitute a series of predatory practices under the antitrust laws. Nor is it relevant, as the Court below thought, "that a music purchaser * * * cannot refuse to bargain on a union's demand that only musician-employees who belong to the Local union be employed"; since *admittedly* there is not and never has been bargaining with purchasers of music. Likewise, it is irrelevant that travel restrictions and employment quotas are *usually* (*i.e.*, in *other* unions) mandatory subjects of bargaining; because it is *undisputed* that defendant Unions systematically refuse to bargain or deal with leader-employers. Even if it be true that the national labor policy "demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man" (as the Court below stated), that somewhat unqualified statement does not help the petitioning Unions to an exemption from antitrust law obligation, because said Unions systematically refuse to bargain with orchestra-leader-employers. The Court below erred in holding that "exertion of pressure on orchestra leaders to join the union reflects a legitimate concern for the closed shop"; since the closed shop is banned by Federal statute. It was error for the

Court below to regard the petitioning Unions establishment of minimum employment quotas as merely a "term or condition of employment". Those employment quotas are different from employment quotas encountered in other cases involving other unions; because the Unions reckon the leader-employer as *one of the quota;* whereas in other contexts the *employer* is *never part of the quota.* This necessarily means that the minimum employment quotas of the defendant Unions result in price-fixing. The orchestra-leader-employer may not waive this Union decreed minimum profit for leaders (Plaintiffs' Exhibit 241).

3. The Norris-LaGuardia Act does not take *all* "labor disputes" outside the reach of the Sherman Act because application of the Sherman Act involves a balancing of conflicting Congressional policies as set forth in the Sherman Act, the Norris-LaGuardia Act, the NLRA, the Taft-Hartley Act and the Landrum-Griffin Act. To grant unions indiscriminately a blanket exemption with respect to *all* "labor disputes" would premise no balancing of conflicting policies but rather elevation of the Norris-LaGuardia Act's policy to paramount status. *Hunt* v. *Crumboch,* 325 U. S. 21 (1944) is not today an unclouded precedent. It antedated the Taft-Hartley Act (1947) and the Landrum-Griffin Act (1959). In any event, the Unions in those cases *did bargain collectively;* whereas the Unions here never did. For this reason, the petitioning Unions' travel restrictions and their peculiar minimum employment quotas, for example, are not immune from attack because of the Norris-LaGuardia Act. Nor is it true that under that Act, or under the Sherman Act as construed in the Allen-Bradley doctrine, the *purpose* of the combination between unions and non-labor groups must be "to create a local business monopoly". It is sufficient that the *effect* of the combination is to create a business monopoly. The cases do not require that there must be a conscious *conspiracy* between the collaborators. A *combination* be-

tween the petitioning unions and non-labor groups to fix prices, to suppress competition and to impose other commercial restraints, is sufficient to cause the instant cases "to fall outside the protection of the definition of labor dispute in §13 of the Norris-LaGuardia Act."

4. Enforcement of petitioning Unions' bylaws and practices impose an extensive series of unreasonable burdens on interstate commerce.

5. There is absolutely no competition *for sidemen's jobs* between professional orchestra-leaders on the one hand and their employee-musicians on the other. The record is altogether devoid of evidence of any credible *specific* instance of such competition. The record merely contains general assertions of "competition" by Union officials where competition simply means that an established professional leader sometimes (very rarely) finds that he has lost an engagement to a sideman-turned-leader. Such "competition" *between leaders* is not lawfully subject to regulation by unions combined with non-labor groups. No professional leader admitted such competition to any significant extent. Leader-employers are not proper subjects for Union membership, any more than grease peddlers were in *Los Angeles Meat Drivers case* (371 U. S. 94). Price-fixing and other monopolistic practices of the petitioning Unions in combination with non-labor groups may not lawfully be excused upon the vague, unsupported ground that there is "job or wage competition or any other economic interrelationship" between leader-employers and their employees. The right of an orchestra leader to perform usual functions as such (*e.g.*, the playing of a musical instrument while leading) without interference by Unions is as sacred as the right of the employee to engage in concerted activity or to perform his job in order to earn his livelihood.

6. There is a busy class of leader-employers, who are *full-time, professional* orchestra leaders deriving their liveli-

hood or most of their livelihood from their profession. It is relatively extremely small (less than 2%) by comparison with the total number of AFM members who, from time to time, function *ad hoc* as "orchestra leaders" and who in desultory fashion improvise orchestras for such sporadic occasions. The Court below seemed to think that the existence of a class was destroyed by the admitted fact that many leader-businessmen in the class presented by the plaintiffs are in favor of Union price-fixing and the Unions' other commercial restraints. Such an interest in unlawful practices is not properly cognizable at law. No leader-employer should be heard to say that he is in favor of price-fixing by the petitioning Unions in combination with himself and other orchestra-leader-employers of like mind.

ARGUMENT

POINT I

(Addressed to Questions 1, 3, 4 and 5)

The Union price-fixing (and other antitrust law violations) in these cases is largely effectuated by Union bylaws obligating all members, including orchestra-leader-employers. The latter are entrepreneurs, who as union members previously participated in formulation of Union prices (and other commercial restraints) at Union Price List Meetings. Those bylaws are enforced in combination with many types of businessmen (including such orchestra-leader-employers); and they necessarily involve, precisely because they are effective, agreement or combination among competing orchestra leaders and other businessmen, such as booking agents, for the purpose of preventing competition at prices below the minimum prices promulgated and enforced by the petitioning Unions.

A. *Nature of Union price tampering.* Three separable Sherman Act violations *concerning prices* are involved in the instant cases: (i) naked price-fixing unilaterally[5] imposed by AFM and its Locals as Union bylaws, and en-

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[5] The words, "unilateral" and "unilaterally", have sometimes been used ambiguously in the course of this litigation both by the litigants and the courts. In one sense, the Union price-fixing, insofar as it results in actual market prices which conform with the price-fixing mandates contained in Union bylaws, was not and is not unilateral, *i.e.*, conduct attributable to the Unions alone. There are two reasons for this. In the first place, the Unions' minimum *prices* (and wages) are often formulated at so-called "Price List" meetings, attended by leader-employers, as Union members who participate in the discussions and actions at the meetings resulting in formulation and promulgation of minimum *prices* (and wages) (Tr. 141, 143, 257, 252-255, 1253, 1255, 1242-43, 1948-49, 1959-64, 3266, 3301-3303). In the second place, price-fixing by the Unions alone would be an

(Footnote continued on following page)

forced in combination with non-labor groups; (ii) Union-mandated combinations, arrangements or agreements with and among competing orchestra-leader-employers not to compete at prices below those fixed by AFM and its Locals; and (iii) effective Union sanctions upon, and boycott of, orchestra-leader-entrepreneurs who venture to compete at prices below those fixed by the Unions (App. 93-94, 98-99).

1. *Price fixing by Unions and their version thereof.* Up to the very submissions to this Court, the petitioning Unions never dropped the pretense that they were *not* fixing *prices*. Obviously, a union which, by its explicit bylaws[6] or by any other method, effectively requires price-fixing (and suppression of competition) could not possibly *act alone*. For it to act *alone* in respect of price-fixing would be ineffectual loneliness of operation having no effect on the market. No one in the market would pay any attention to a union acting *alone* to fix prices. When the union's efforts at price-fixing actually result in market prices conformable to the union bylaws, we have, as here, actual price-fixing. Once the market thus begins to reflect, on a wide or significant scale, the union minimum prices, this

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(Footnote continued from preceding page)

empty and impossible gesture. Unless orchestra-leaders-employers and booking agents respected and enforced Union prices by charging them to purchasers of music, there would be no fixed prices *in the market for musical services.*

In another sense, the Union price-fixing is literally and clearly *unilateral,* insofar as it takes the form of a promulgation by the Union of "Price Lists" which are *bylaws* formulated either by Price List meetings or by the Executive Board of Local 802 (when a quorum is not available for a Price List meeting). Union minimum prices are never promulgated as the act of a Price List meeting or as the act of the Executive Board of Local 802. They are only promulgated as a Union bylaw, which is the act *of the Union,* not of any group within the Union. That bylaw (*E.g.,* Plaintiffs' Exhibit 187, Tr. 28) is then enforced *by the Union in combination with many types of employer-businessmen.*

[6] Plaintiffs' Exhibits 187 through 195; 173 through 177; 161 through 164; 205 through 209; Defendants' Exhibit CM; App. 93.

means, at the very least, that those who sell musical services thus priced have adopted, agreed with or simultaneously fallen in line with the union-promulgated prices. In this way they have *ipso facto* and necessarily combined or collaborated with the union. This reasoning is backed by extensive proof in the Record from both plaintiffs' witnesses and defendants' witnesses demonstrating that AFM and Local prices are widely and faithfully adhered to (Tr. 10-11, 17; 84; 89-90; 137; 166-67; 206-07; 214; 230; 249-250; 290-298; 656-664; 813, 828, 862-863, 968, 1061-62, 1172, 1223, 1345, 1667-73, 2201, 3009, 3653-3655; especially 274) throughout the musical industry.

During all of the prior litigation, and especially during the trial (Tr. 749, 3673; 62; 669-670), the specious argument of the petitioning Unions was, nevertheless, that they merely fixed wages never prices. Before the Court of Appeals and even before this Court, as before the Trial Court, the petitioning Unions maintained that the minimum prices imposed by them were nothing more than "'the aggregate of the minimum compensation payable to sidemen and leader'' (Petition for a Writ of Certiorari, p. 5; Tr. 3673). Defendants' own admissions (App. 77: Plaintiffs' Exhibit 388, ¶¶ 13 and 4, which are admissions made pursuant to request for admission under Rule 36, FRCP) and (Tr. 3653-3655) testimony of Max Arons, then Secretary and now President of Local 802, demonstrate that contention is false. Moreover the error of this argument was also exhibited by the Cross-Petitioners' Brief, pages 8-9.

The stark price-fixing by petitioning Unions, in combination with orchestra-leader-employers and other non-labor groups, literally *permeates* the Record. It covers both single and steady engagements, *i.e., all musical engagements* (Tr. 17, 54, 55, 89-90, 137, 139, 145, 180-181, 242-46, 252-54, 265-66, 273-74, 374, 419, 449-51, 472-73, 532-533, 641-43, 656-658, 662, 669-673, 695, 706, 748-49, 813, 828, 843, 862-63, 937, 968, 996, 1001-05, 1061-62, 1102, 1122, 1133, 1172, 1223, 1242-1243, 1253-55, 1301-02, 1345, 1362, 1368-69, 1391-

91A, 1594, 1633, 1650-67, 1667-1673, 1680, 1700, 1729-30, 1839, 1948-49, 1959-64, 2029, 2182-84, 2201, 2472-75, 2505-06, 2510, 2534, 2536, 2567-68, 2729, 3009, 3163, 3266, 3301-2, 3303, 3317, 3381-3382, 3493-94, 3626, 3653-3655, 3673-75, 3727-28, 3845),

The District Court, obviously recognizing that the Union conduct amounted to price-fixing, engaged in specious, speculative arguments, devoid of support in the Record, for the purpose of justifying the Union's price-fixing.[7]

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[7] The following quotations from the Trial Court's opinion demonstrate this:

(1) "* * * If they [orchestra leaders] undercut *the union wage scale* or do not adhere to *union regulations regarding hours or other working conditions* when they perform, they will undermine *these union standards*. They would put pressure on the union members they compete with to correspondingly lower their own demands * * *." (emphasis added)

Here the Trial Court seems to be taken in by the Union pretense that the minimum *prices* imposed by the Unions were really aggregates of *wages;* because the "union wage scale" and the "union regulations" are *Union bylaws* which on their face mandate price-fixing.

(2) "* * * Any cuts by participating leaders *of their fees* below a union minimum *or in the price of an engagement* below a union minimum * * * puts an obvious downward pressure on the wages of subleaders and sidemen." (emphasis added)

Here the Trial Court was obviously trying to excuse bald Union *price-fixing* which is enforced in combination with many employer-businessmen.

(3) "* * * It is *unquestionably true* that skimping on the part of the person [orchestra leader] who sets up the engagement *so that his costs are not covered* is *likely* to have an adverse effect on the wages paid to the participating musicians. * * *"

Here again reference is obviously to Union price-fixing, where what is "likely" is strangely equated to what is "unquestionably true".

(4) The Trial Court avoided deciding whether the orchestra leader is an employer-businessman or an independent contractor; and merely assumed that orchestra leaders are, ambivalently, *either* (App. 163). As a result, the Trial Court even adopted the

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Although the initiative for price-fixing came from the Unions (Plaintiff's Exhibit 187, Local 802 Bylaws, Article VII, especially Sections 4 and 6), it is equally true that many leader-employer-businessmen combined (Tr. 141-143; 252-257) with the said Unions *and with each other under Union auspices,* to violate §§ 1 and 2 of the Sherman Act. The nub of the antitrust violations, therefore, is not merely the existence of Union bylaws, regulations and practices which enforce minimum prices. It includes (i) active participation of employer-businessmen (*i.e.,* orchestra leaders) in the actual formulation and enforcement of those bylaws, regulations and practices at Price List meetings (Tr. 257; 143; 141; 1253; 1255; 1275; 1290; 1948; 1949; 1959-1964; 3266; App. 106 ¶ (23)) and (ii) agreement or arrangement of leader-employers, *inter se,* not to bid against each other at prices below Union minimum prices.

The problem thus presented is *national* in scope; because price-fixing thus formulated and thus enforced is characteristic of every AFM Local through the United States (Tr. 10; 11; 17-18; 2534; Plaintiffs' Exhibit 306; App. 96).

The Sherman Act does not permit leader-employers and leader-entrepreneurs to associate themselves *with their own employees in a labor union* for the purpose or with the effect of promoting the orchestra-leader-employer's business welfare or of regulating the competition and entrepreneurial functions of competing orchestra leaders. See cases cited App. 194. Cross-petitioners have been unable to find

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(Footnote continued from preceding page)

Union's artificial denomination of the orchestra leader as a "personnel manager": "Nor is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that function."

Here, the Trial Court refers to the *price* of the engagement or to the leader's *profit* as fixed by the petitioning Unions and seems to attempt an excuse for such price-fixing by reference to some sort of unspecific relation between price or profit and the costs involved. The Court below conclusively refuted this reasoning by the Trial Court (App. 197-198).

a single case in which an employer-entrepreneur was placed in a labor-group. All cases are contrary. Even Local 802 President Manuti seemed to know this (App. 99).

All decided cases condemn, and no case justifies, price-fixing by unions, with or without combination with non-labor groups.

2. *The combination of Unions with non-labor groups.* AFM and Local Bylaws are, in legal contemplation, a "contract"; and AFM and its Locals, constituting as they do aggregates of members organized and regulated by the same bylaws and objectives, are "combinations" or the word has no meaning. These combinations encompass not only Union officials and employees (as is true of all other unions) but also *employer-businessmen, i.e.,* orchestra leaders. The very word, *"union"*, signifies *combination.*

In the ordinary enforcement of antitrust laws against businessmen only, when there is a contract to fix prices, for example, between a manufacturer and his distributor, the rule of *illegality per se* is justifiably applied. The obvious effect of a series of vertical agreements of this kind is to prevent price competition in the resale of the manufacturer's product by his distributors. Likewise, if the distributors agree among themselves not to compete, the economic and legal effect of such horizontal combination is exactly the same. One would have to be ignorant of the ordinary results of such employer practices to fail to recognize that where systems of vertical and horizontal agreements or arrangements are permitted, the inevitable effect is to increase the profits of distributors by eliminating price competition among them.

In the instant cases, the bylaws, with which each orchestra-leader-entrepreneur agrees to comply as an AFM member, constitute a horizontal agreement or contract to fix and to maintain minimum prices between competing

orchestra leaders and to suppress competition at lower prices (Tr. 17-18; 53; 58-60; 64; 65-69; 137-140; 169-170; 242-246; 274; 290-293; 374; 449; 522; 523; 536; 538; 551; 557; 641-643; 656; 658; 662; 672; 996; 1001; 1102; 1133; 1362; 1716; 1839; 1840-41; 1853). These same bylaws which fix prices also constitute a vertical agreement between orchestra-leader-employers on the one hand and employee-musicians on the other, to prevent such price competition; since *all members* are required by Union bylaws[8] to aid in the enforcement thereof by reporting to the Union deviations from all bylaw mandates, including those concerning prices and competition.

These bylaws constitute a horizontal agreement between orchestra-leader-entrepreneurs themselves to abide by Union-promulgated prices and to avoid, and to report, all competition at prices below said prices.

Orchestra leaders like plaintiffs are more than *mere* employers. See Statement, pages 15-25, *supra*. They are businessmen who operate enterprises for profit in competition with other orchestra leaders. They are entrepreneurs subject to Union rules and practices *which largely govern them in their entrepreneurial roles.*[9] Indeed, the leader is a businessman-employer who differs from other businessmen-employers in that the leader's good will and business are more intimately related to his own personal skill, business acumen and personality than is true of most businessmen. A leader's orchestra, even when it is led by a subleader, depends for its business viability upon

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[8] For example, Local 802's bylaws contain the following language (Article IV, Section 1(A)(4)(o): "It shall be a violation and detrimental to the welfare of this local for a member to commit one or more of the following acts, all of which are hereby prohibited, viz.: * * *.

"(o) To fail to report within a week to the Secretary knowledge of any violation of the Constitution, Bylaws or Wage Scales of this local." The Unions use "wages" and "prices' indiscriminately (Tr. 46-49).

[9] See footnote 11, *infra*.

the reputation and style of the orchestra leader and upon his ability to attract and to keep customers.

When the leader plays an instrument, as he usually does, he does not displace a sideman. He actually makes the sideman's job possible. To get engagements and thus to provide jobs he must perform in the mode characteristic of orchestra-leader-employers. For example, the name, Guy Lombardo (Tr. 62-64) or Meyer Davis is literally the trademark signifying the quality and value of *any orchestra* performing under that name, even when Guy Lombardo or Meyer Davis is not present. This method of leading while playing is something all professional leaders use. The purchaser is completely uninterested in the names of the sidemen.[10] He chooses a particular band only because of the leader and his reputation, not because of any sideman. The very name of the band is taken from the employer-leader's name. The leader, as a businessman, takes all of the risks (Tr. 411-412, 1021) of the enterprise. He makes an investment in music library, music stands, uniforms, lighting equipment, sound systems, stationery, advertising, etc. Only the leader assumes risk of the purchaser's credit. If the latter fails to pay, the leader nevertheless must and does pay the wages of his sidemen (AFM

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[10] Said the Court in *Cutler* v. *United States,* 180 F. Supp. at 362-363:

> "The purchaser was interested in the leader, not in the individual musicians, except in rare instances. The leader had established a reputation of putting on good performances. Because of this he was employed not because of a certain man who played the violin or the trombone. What violinist or trombone player was to be employed was the leader's responsibility. The purchaser was interested only in the overall effect, in the montage, not the individual pictures.
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> * * *
>
> "It was plaintiff, and not the purchasers who were in the business of providing music at social functions. The success of this business depended on plaintiff's ability and reputation as a musician. He is the one who bears the loss and gains the profit." (180 F. Supp. at 362, 363)

Bylaws, Article 13 § 29, Plaintiffs' Exhibit 162). Only the leader is responsible to the purchaser of the music for performance of his contract of engagement (*ibid.* Article 16 § 19). The leader hires his sidemen, disciplines or discharges them when necessary, and exercises complete control, economic and artistic, over the employment relationship, just as any other employer (Tr. 309-322, 358-379, 492-496, 504-505, 811-817).

AFM and Local bylaws are themselves witnesses of the combination between the Unions and orchestra-leader-employers, because those bylaws, in the sections noted in the footnote, frequently deal not with purely labor matters, but with *entrepreneurial functions of employers.*[11] For

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[11] A few of these entrepreneural regulations appear in Plaintiffs' Exhibit 162 (AFM Bylaws), from which the following is *not* an exhaustive selection:

Article 1, Section 5(P); AFM supervision over prices.
Article 7, Section 14; requiring contracts to conform to Union prices.
Article 10, Section 5; price regulation and its sanctions.
Article 11, Section 3; dissemination of price lists.
Article 13, Sections 25-30, 33; regulation of leader-employers' businesses.
Article 14, Section 18; regulation of prices for transfer members.
Article 15, Sections 3, 12, 13, 14, 16 and 17; traveling surcharge regulations.
Article 16, Sections 19, 20; regulation of employers' responsibility.
Article 17, Sections 20 and 21; price and contract regulations.
Article 19, Section 1(C); regulation of price and transportation charges.
Article 20, first sentence; prices for traveling theatrical engagements.
Article 23, Section 2; regulation of TV and Radio contracts.
Article 24, Sections 1 and 5; prices for recording and motion pictures.
Article 25, Sections 17, 23, 25B, Third (f); restrictions on leader-employers' business.
Article 26, Section 7; restrictions on employer-booking-agent relationship.
Article 27, Section 5; regulation of circus engagements.
See also the AFM price lists in Articles 20 through 27.

example, plaintiffs Peterson and Carroll were expelled from AFM and Local 802 because, among other reasons, *they failed to charge their clients the minimum prices promulgated by the Union* and they failed to *file engagement contracts* in the form prescribed by the AFM.[12]

3. *Unions allow no competition for musical engagements at prices below their minimum prices.* AFM and Local bylaws not only forbid competition by Union members who are leader-businessmen at prices below those contained in Union bylaws (Tr. 293; 3653-3655; 274; 658; 662-663). They also require sanctions against, and eventual expulsion of, a leader who undercuts Union prices (App. 93-94), as plaintiffs Carroll and Peterson, noted above (Tr. 290-298). Such an expelled leader is then subjected to a variety of effective Union boycott and blacklisting gambits. As a follow-up, the Unions forbid sidemen to perform for expelled leaders (Tr. 293-294). This has often forced an expelled orchestra leader to give up his profession.

There is, doubtlessly, a valid distinction between the kind of price tampering which prevents or restrains price competition and the kind which does not. The kind which prevents or restrains price competition is always unjustifiable and is *per se* a violation of the antitrust laws. The Union practices in the instant cases are illustrations of such *per se* violations, as the Court of Appeals ruled with respect to some (too few, say cross-petitioners) of them. The record contains no evidence of any reasonable business or union purpose or actual competitive or other benefit which could justify[13] the types of price-fixing and restraint of trade in which the Unions have been en-

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[12] *Carroll* v. *Associated Musicians*, 206 F. Supp. 462, reversed on other grounds (which later became moot), 310 F. 2d 325.

[13] For example, cross-petitioner, Marty Levitt, was disciplined by the Union for failing to charge his client the Union-prescribed minimum *prices*. However, at no time did he fail to pay the wage scales unilaterally (and therefore unlawfully) prescribed and mandated by Local 802 (Tr. 579-89, 612-18).

gaging in combination with non-labor groups. Certainly, the Union price-fixing and suppression of competition does not increase efficiency or even prosper the orchestra leader's business; especially since the higher the prices, the less the business for many leaders, who are not well established (Plaintiffs' Exhibit 56). In any event, the Unions prevent free competition between orchestra-leader-employers; and they admit this,[14]

In ordinary industrial practice, this Court has made it clear, contracts or arrangements among competitors to boycott distributors who do not adhere to a maximum resale price are illegal *per se*. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

In the instant case, the Union bylaws defining minimum prices constitute not only an agreement but a *stimulus* for competing orchestra leaders to boycott those orchestra leaders who do not adhere to the prices enforced by the Unions in combination with non-labor groups. Obviously, such bylaw agreements when carried to performance are aimed at the destruction of weaker orchestra-leader-employers (who can't, on their own, command even union *minimum prices*), the prevention of competition and the coercion of Union members, as well as non-member purchasers of music, to deal only with leader-employers who adhere to the Union rules respecting price-fixing and suppression of competition.

B. *Discussion of cases.* Brief discussion of eight cases decided by this Court demonstrates that labor's exemption from the antitrust laws is not available to the petitioning Unions.

1. *U. S.* v. *Brims*, 272 U. S. 549 (1926), held that violence was irrelevant under the Sherman Act. Certain local manufacturers of mill work, who used union carpenters, found their business threatened by competition

[14] See Defendants' Admission, ¶ 63 and ¶ 14, page 81 of the Appendix (Tr. 293, 3653-55).

from non-union mill work. Because the union involved deemed this situation a threat to its wage structure, it agreed with the building contractors that union carpenters would not be required to work on non-union mill work. This arrangement certainly smacked of secondary activity; and it was obviously motivated by a desire to prevent non-union goods from competing with union products. Therefore, this Court found the arrangement illegal under the *Second Coronado* case (*Coronado Coal Co.* v. *U.M.W.*, 268 U. S. 295 (1925)) and under previous secondary boycott decisions. The *Brims* case, having been decided in 1926, came about six years prior to the Norris-LaGuardia Act. Nothing in the opinion in *Brims* or in a subsequent case involving similar facts (*Local 167, I.B.T.* v. *U. S.*, 291 U. S. 293 (1934)) indicates that they went beyond secondary boycott cases or the *Second Coronado* case.

In the *Apex* case (*infra*), Mr. Justice Stone was to leave no doubt as to the continued vitality of the *Brims* case as a precedent, because he referred to it as a "case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices" (310 U. S. at 501). But Mr. Justice Stone's reference to *Brims* appears to be inaccurate; since the union in *Brims* was *not being used by any employer* but was actively protecting its own organization and its wage scale. The union's conduct in *Brims* was directly related to collective bargaining in which the involved union and employers had engaged; because the exclusion of the non-union products was actually essential to the maintenance of the union scale set forth in the collective bargaining agreement.

In the instant cases, the Unions had no collective agreement, and never engaged in bargaining, with orchestra leaders.

2. *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940). This involved the

"vendor system", developed during the depression. Vendors bought milk from non-union dairies and sold it to retail stores, enabling the latter to cut the price of milk. The Milk Wagon Drivers Union, which was an AFL organization, thought that this method of distribution was injurious to its members. Therefore, it picketed the stores which handled milk under the vendor system. Windows were broken and other types of violence occurred during the picketing. The vendors themselves and other employees of the dairies organized a CIO union. Eventually, an injunction suit was instituted against the Milk Wagon Drivers Union by the operators of the vendor system. The District Court denied an injunction because the requirements of the Norris-LaGuardia Act had not been met. The Seventh Circuit Court of Appeals reversed the decision, deciding that no "labor dispute" existed; and that the purpose of the picketing was to obtain the abandonment of the vendor system, an issue which the Seventh Circuit thought was unrelated to labor's efforts to improve working conditions. This Court unanimously reversed the judgment of the Circuit Court on an opinion by Mr. Justice Black, who concluded that this was a *labor dispute* because the vendors were for all practical purposes *employee*-members of a union competing with members of the AFL union for employment in the milk industry. The vendor system was definitely related to labor's effort to improve working conditions. The Sherman Act did not nullify application of the Norris-LaGuardia Act to the case. *There was no combination with non-labor groups.* Congress did not intend that what were misinterpretations of the Clayton Act should be repeated in the construction of the Norris-LaGuardia Act. Both unions involved had labor contracts. The CIO labor contract referred to the vendors or peddlers as "employees"; and the employers treated the vendors as employees. What was involved then was a vendor system invented by employers to evade payroll taxes by transforming persons who were originally employees and who were still *func-*

tionally employees into speciously styled "self-employed" or "independent vendors."

By contrast, orchestra-leader-employers cannot be classified as persons who are functionally or in any other way *employees.* The vendors in the *Lake Valley* case were definitely a labor group. This cannot properly be said of orchestra-leader-entrepreneurs who are employers and businessmen, *i.e.,* they constitute a non-labor group.

3. *Apex Hosiery Co.* v. *Leder,* 310 U. S. 469 (1940). Under this case, labor unions "to some extent not defined" (310 U. S. at 488) continued to be subject to the antitrust laws. The Sherman Act prohibited *restraints on competition* in the market for *products* and *services,* as rendered by leaders and their bands. The union's activity had not actually affected price competition in the hosiery market. Therefore, there was no liability under the Sherman Act. This case made no reference to any Congressionally defined immunity for labor organizations. It was decided on straight antitrust law principles, distinguishing *Local 167, IBT* v. *U. S.,* 291 U. S. 293 (1934) and *U. S.* v. *Brim,* 272 U. S. 546 (1926), in which unions conspired with, and aided, illegal *combinations of employers.* Thereby, this Court suggested *in 1940* that combination with non-labor groups might deprive unions of their exemption. It delineated a corresponding exemption for union activities which involved the *labor* market rather than the *product* market.

AFM and its locals, on the contrary, suppress competition in a variety of ways, especially by enforcing minimum prices.

4. *U. S.* v. *Hutcheson,* 312 U. S. 219 (1941). Here, this Court squarely faced labor union liability for antitrust penalties.[15]

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[15] The Court did not apply the commercial *competition* test developed in the *Apex Hosiery* case.

It read the Sherman Act, the Clayton Act and the Norris-LaGuardia Act (the NLRA was not relevant to the case) as a "harmonizing text of outlawry of labor conduct", asserting that Congress, by the Norris-LaGuardia Act, intended to restore to § 20 of the Clayton Act an original broad purpose to remove the "taint" of illegality from such union activities as strikes, pickets, boycotts: "So long as a union acts in its self-interest *and does not combine with non-labor groups,* the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end to which the particular union activities are the means" (312 U. S. at 232; emphasis added).

To many lower courts, the language just quoted called for blanket exemption for all § 20 activities, regardless of union purpose or effect on interstate commerce or on competition in the product or service market. This indiscriminate application of Justice Frankfurter's formula led to much injustice and confusion.[16] It is not *accommodation* of different statutes but *supplantation* of one by the other. This is not consistent with the totality of union-antitrust rules elaborated by this Court since 1941.

But even before 1945, unions lost their exempt status by combining with non-labor groups (such as employers or businessmen) to suppress competition, *Truck Drivers Local 421 IBT* v. *U. S.*, 128 F. 2d 227 (8 Cir. 1942); *U. S.* v. *New York Electrical Contractors Association*, 42 F. Supp. 789 (S.D.N.Y. 1941); *U. S.* v. *Associated Plumbing*

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[16] *Gundersheimer's Inc.* v. *Bakery Workers*, 119 F. 2d 205 (D. C. Cir. 1941); *U. S.* v. *Bay Area Painters & Decorators Joint Comm., Inc.*, 49 F. Supp. 733 (N. D. Cal. 1943); *U. S.* v. *American Federation of Musicians*, 47 F. 2d 304 (N. D. Ill. 1942), affirmed *per curiam*, 318 U. S. 741 (1943); *U. S.* v. *United Brotherhood of Carpenters*, 313 U. S. 539 (1941); *U. S.* v. *Building & Construction Trades Council*, 313 U. S. 539 (1941); *U. S.* v. *Carrozzo*, 37 F. Supp. 191 (N. D. Ill.), affirmed *per curiam sub nomine; U. S.* v. *International Hod Carriers District Council*, 313 U. S. 539 (1941).

& Heating Merchants, 38 F. Supp. 769 (W. D. Wash. 1941); *U. S.* v. *International Fur Workers Union,* 100 F. 2d 541 (2 Cir. 1938), cert. denied 306 U. S. 653 (1939).

In the instant cases, AFM and its locals combine with many non-labor groups to fix prices, to impose commercial restraints, etc.

5. *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers,* 325 U. S. 797 (1945). In that case, this Court mischaracterized what had been a *union*-instigated plan to eliminate competitors as one in which the union had been used as a tool to "aid and abet" an employer combination.[17]

In *Allen-Bradley* this Court noted that *if* the union had refrained from *combining* with employers, its activities would have been exempt under § 20[18] of the Clayton Act. The collective bargaining agreements in this case were part of a larger conspiracy *to monopolize the industry* and *to fix prices.* This Court squarely faced the task of harmonizing the Congressional policy (Sherman Act) of preserving a competitive business economy with the Congressional policy (NLRA and Norris-LaGuardia Act) of protecting and encouraging collective bargaining. The outcome of that reconciliation was the conclusion that labor unions violate the Sherman Act when they aid and abet, or combine with, *businessmen* to engage in the precise activities forbidden by the Act. *Allen-Bradley* appears to be the first case in which this Court expressly considered the Congressional aim of fostering collective bargaining as relevant in a determination of the applicability of antitrust laws to labor unions.

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[17] See Opinions of Justices Roberts and Murphy, 325 U. S. at 813, 820. The District Court had made it clear that the scheme had been initiated and forced upon the employers by Local 3 (41 F. Supp. 727, S.D.N.Y. 1941).

[18] Quoted at page 35 of this Brief.

That aim is inapplicable here, because the *petitioning unions never bargain with orchestra-leader-employers,* despite passage of the Wagner Act in 1935 and the Taft-Hartley Act in 1947. They circumvent bargaining by forcing employers into Union membership. *Ipso facto,* Union bylaws fixing wages (and minimum prices) are as much the obligation of union members (including leader-employers) as any provision of a labor contract might be.

It is, of course, significant for the purposes of the instant antitrust cases that the identical union activities "may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone *or in combination with business groups*". (325 U. S. at 810; emphasis added.)

In *Allen-Bradley,* this Court did not precisely define illicit labor-management *combinations.* As a result, certain lower courts misapplied the *Allen-Bradley* doctrine in cases where employers or businessmen were coerced by unions to boycott other employers or businessmen. *East Texas Motor Freight Lines* v. *International Brotherhood of Teamsters,* 163 F. 2d 10 (5 Cir. 1947); *Davis Mills Corp.* v. *Federation of Dyers,* 18 LRRM 11 CCH Labor Cases, 69698, 69704 (S.D.N.Y. 1946). Some courts, however, did not make this mistake. *Westlab Inc.* v. *Freedom Land, Inc.,* 198 F. Supp. 701 (S.D.N.Y. 1961). On principle, it seems clear that unions which coerce employers into violations of the Sherman Act should be *the more liable* under the antitrust laws. They fit the real, factual situation in *Allen-Bradley:* union combination with victimized businessmen.

A number of lower courts, in applying *Allen-Bradley,* properly and logically regarded collective bargaining agreements as a manifestation of illegal *combination. U. S.* v. *Milk Wag. Drivers Union,* 153 F. Supp. 803 (D. Minn. 1957); *Lystad* v. *Local 223, IBT,* 135 F. Supp. 337 (D. Ore. 1955); *Adams Dairy Co.* v. *St. Louis Dairy Co.,* 260 F. 46, 53 (8 Cir. 1958); *U. S.* v. *Hamilton Glass Co.,* 155 F. Supp.

878, 884 (N. D. Ill. 1957); *California Sportwear & Dress Association,* 54 FTC 835 (1957).

Most lower courts, on the strength of *Allen-Bradley,* correctly considered the agreement as a *per se* violation of the antitrust laws where (*as here*) it embodied market restraints. *U. S.* v. *Gasoline Retailers Association,* 285 F. 2d 677 (7 Cir. 1961); *U. S.* v. *Minneapolis Electrical Contractors Association,* 99 F. Supp. 75 (D. Minn. 1951).

A number of lower courts, taking too narrow a view of the meaning of *union-employer combinations,* thought that collective bargaining agreements could not be held to constitute evidence of an unlawful combination when the employer's participation in the combination was the result of union coercion. *Greenstein* v. *National Skirt & Sportswear Association,* 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed, 274 F. 2d 430 (2 Cir. 1960); *Pevely Dairy Co.* v. *Milk Wagon Drivers Union,* 174 F. Supp. 229 (E. D. Mo. 1959), appeal dismissed, 283 F. 2d 519 (8 Cir. 1960); *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.* 35 CCH Labor Cases 97393 (W. D. Okla. 1959). This line of cases illogically neglects (i) the effect of the involved *combination,* namely, suppression of competition and (ii) the aggravated union culpability in misusing union power for illegal, non-labor objectives.

Other courts properly took an opposing view. *U. S.* v. *Fish Smokers Trade Council, Inc.,* 183 F. Supp. 227 (S.D.N.Y. 1960); *California Sportswear & Dress Association,* 54 FTC 835 (1957); *McHugh* v. *U. S.,* 230 F. 2d 252 (1 Cir.) cert. denied, 351 U. S. 966 (1956). They ruled that coercion of the employer might be an excuse for the latter; but in such case the employer could not be for the union or in the union. *Indeed, in none of the cases of lower courts cited above were the employers members of the union.* Cross-petitioners have been unable to find a single case where *employers* were ever held to be mem-

bers of a *labor group* in the application of the *Allen-Bradley* doctrine.

We have every kind of union combination with non-labor groups (*i.e.*, where the latter are coerced and where the latter cooperate willingly) in the instant cases.

6. *Los Angeles Meat & Provision Drivers Union* v. *U. S.*, 371 U. S. 94 (1962), where still another type of union combination with non-labor groups was found objectionable. There, some members of the defendant union were *self-employers or entrepreneurs.* They had no proper place in the union, this Court held. See also *U. S.* v. *Womens Sportswear Manufacturers Association*, 336 U. S. 460 (1949); *Hawaiian Tuna Packers Ltd.* v. *International Longshoremens Union*, 72 F. Supp. 562 (D. Hawaii, 1947).

Union activities, even those which fell within § 20 of the Clayton Act, always lost their exemption if (*as here*) they were carried out pursuant to an agreement with non-labor groups *for anticompetitive purposes. U. S.* v. *Employing Plasterers Association*, 347 U. S. 186 (1954); *U. S.* v. *Employing Latherers Association*, 347 U. S. 198 (1954); *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Association*, 155 F. 2d 799 (3 Cir. 1946).

It is not necessary that the *combination* should be the result of an explicit agreement. The involved activities and surrounding circumstances could *implicate* arrangement or agreement. *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208 (1939); *Local 175, International Brotherhood of Electrical Workers* v. *U. S.*, 219 F. 2d 431 (6 Cir.), cert. denied, 349 U. S. 917 (1955); *U. S.* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960); *U. S.* v. *Milk Drivers Union*, 153 F. Supp. 803 (D. Minn. 1957).

The Norris-LaGuardia Act's requirement that union participation be shown by "clear proof" (Norris-LaGuardia Act, § 6, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964)) was

not forgotten. *United Brotherhood of Carpenters* v. *U. S.*, 330 U. S. 395 (1947).

In the instant cases union participation is indisputable.

7. *United Mine Workers of America* v. *Pennington*, 381 U. S. 657 (1965). Here again unions were held not to be exempt under the Sherman Act when they combine with non-labor groups. Even where improper combination "found expression in a collective bargaining agreement", there was no immunity (381 U. S. at 662-63). Likewise, self-interest alone did not immunize the union where the restraint on the product or service market was "direct and immediate" and where the benefit to labor was only indirect (381 U. S. at 663). Even the national labor policy on collective bargaining provided support for the denial of union exemption in a case *where* (as was frequently true in the instant cases) *the union agreed with one set of employers to impose a certain wage scale on another set* (Id. at 666). Mr. Justice White concluded that such agreement was also contrary to the fundamental policy of the antitrust laws; because, if an exemption were provided from antitrust law liability where the agreement was to impose identical wages on weaker employers, it would be practically impossible to deny exemption to discriminatory strategy developed to impose higher wages on competitors.

Throughout the reasoning of the various opinions in Pennington, price-fixing was always regarded as an illegitimate union objective.

In the instant cases, petitioning Unions make a habit of agreeing with one set of employers to impose wage scales on another set (Tr. 58-60, 64-69, 74-76, 184, 186-187, 237-238, 278, 1267, 1278-1279, 1292, 3571-3572, 3581).

8. *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965) where the union had tried to

dismiss the complaint on the grounds (i) that the NLRB had exclusive jurisdiction over the complaint and (ii) that the controversy fell within labor's exemption to the anti-trust laws. Mr. Justice White joined by Chief Justice Warren and Mr. Justice Brennan rejected the first contention (that the District Court should have stayed its proceeding pending a determination by the NLRB), because (i) the courts are not without experience in making such determinations; (ii) resolution of the question whether the case involved a "term or condition of employment" would not have been necessary under *Pennington* had the alleged union-employer combination been proven; and (iii) there was no appropriate alternate procedure for obtaining such a determination anywhere else. A single employer, through a collective bargaining agreement with a union, had participated in a union combination with a non-labor group. That fact "does not compel immunity for the agreement" (381 U. S. at 689). In elaborating an accommodation between the conflicting Congressional policies, Mr. Justice White addressed himself to the question whether the marketing hours restriction was "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision * * * falls within the protection of the national labor policy" (ib. at 689-90). The Court held that evening marketing hours would impair job jurisdiction or substantially alter hours or work load; and in this respect found that the District Court's finding was not "clearly erroneous". FRCP 52(a).

The dissenting opinion of Justices Black, Clark and Douglas concluded that the exemption should have been denied on the authority of *Allen-Bradley*. Mr. Justice Douglas thought that a multi-employer collective bargaining agreement was *prima facie* evidence of a conspiracy among the employers and the unions to "impose the marketing hours restriction on Jewel via a strike threat by the unions (381 U. S. at 736).

Mr. Justice Goldberg, with whom Justice Harlan and Stewart concurred, dissented from the Court's opinion in *Pennington* but concurred in its judgment in *Jewel Tea*. His dissent was really nothing more than a defense of collective barganing as he, too comprehensively, envisioned it. It obviously provides no comfort for the petitioning Unions in the instant cases, because they do not bargain collectively and have never done so (Tr. 26). Even on Mr. Justice Goldberg's theory, the exemption for provisions in a labor contract dealing with mandatory subjects of bargaining should not extend to those contracts with non-mandatory subjects. He held explicitly that the "direct and overriding" interest of unions in working conditions is "clearly lacking" where the subject of the agreement is "price-fixing" or "market allocation" (ib. at 732-33).

In the instant cases, the unions, for example, negotiate a labor contract with the Hotel and Restaurant Association in New York City. The number of employees of hotels and restaurants who are musicians is negligible. But the hotel and restaurant labor contract is applied to *all orchestra-leader-employers who bring their orchestras to hotels and restaurants in the New York City area* (Tr. 64, 237-238, 277-278, 3581). Thus, the labor agreement between Local 802 and the hotels and restaurants imposes a certain wage scale on other employers with other bargaining units. An agreement to impose certain wage scales on *other* employers is really not concerned with the working conditions of employees in the particular bargaining unit directly involved in the negotiation. Mr. Justice White was therefore on solid ground when he concluded that a union must be denied immunity without regard to predatory intent in such cases; because this type of labor agreement imposes a direct restraint on competition in the product or service market. Also, agreements to impose conditions on *other, non-negotiating employers* interfere with the process of collective bargaining between the union and the negotiating employers.

C. *Critique of certain passages in the opinion below.* Cross-petitioners respectfully dissent from certain findings, principles and reasoning contained in the Second Circuit's opinion:

1. *App. 193-194:*

> "* * * the Norris-LaGuardia Act takes all 'labor disputes', as therein defined, outside of the reach of the Sherman Act.
>
> "Appellants contend that this case comes within the rule of *Allen Bradley Co.* v. *Local 3,* 325 U. S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint."

If the Norris-LaGuardia Act takes *all* "labor disputes" beyond the reach of the Sherman Act, jurisprudence surrenders to the mere *nominalism* of one of the parties; unions which combine with non-labor groups to fix prices, to suppress competition, etc., have only to dream up a "dispute" with an involved employer in order to provide themselves with antitrust law immunity; and there is an end to *accommodating* the Sherman Act to Federal labor laws, because the latter (and the Norris-LaGuadia Act) in effect repeal the former.

Allen Bradley laid down no such rule, which finds support in neither law nor reason. "Labor disputes" have an unconscionable scope as *literally* defined. Yet, the Norris-LaGuardia Act did not prevent the *Allen Bradley* ruling, despite the fact that the case exemplified a "labor dispute", if the statutory definition is read with indiscriminate literalism. Courts have found it reasonable, nevertheless, to read the definition of "labor dispute" less rigidly and literally.

2. *App. 194:*

> "Under the appellants' view of this case, there is a conspiracy by the unions with 'non-labor' groups to

> engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion."

Plaintiffs (appellants) constantly urged not a *conspiracy,* but a *combination,* between defendant Unions and many orchestra-leader-entrepreneurs, booking agents, hotels and others, to fix prices, to suppress competition, to burden commerce unreasonably and to impose other commercial restrictions upon plaintiffs and all *professional* orchestra-leader-employers.

The Court below erred grievously in stating that the *facts* do not support such a combination. The record is replete with such facts and they were never contradicted. Indeed, defendant Unions, because they include leader-employer-entrepreneurs, are essentially *combinations* or *organizations* of labor unions with non-labor groups. The very words, "union" and "labor organization", connote *combination* and *collaboration.* When such combination or collaboration includes (as here) a labor union and employee-members, on the one hand, and many employer-entrepreneurs, on the other, there is the kind of *combination* forbidden by *Allen Bradley.* Indeed there is, then, an employer association or an organization of businessmen in a trade association *under Union auspices.*

3. *App. 194:*

> "For a union's activity to fall outside of the protection of the definition of a 'labor dispute' in § 13 of the Norris-LaGuardia Act * * *, it must be shown that there was a conspiracy with a 'non-labor group'. That principle was reaffirmed by the opinion of the Court in *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965)."

A *combination,* as distinguished from a *conspiracy,* is sufficient; and such a combination is massively evident in

the record, which contains no contrary evidence. Nor did *Pennington* hold that a *conspiracy,* rather than a *combination,* with a non-labor group was necessary.

4. *App. 195:*

> "In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception."

The record does *not* show that *all* restraints "were instituted unilaterally" (See footnote #5, *supra;* and also pp. 68 ff, *infra*) by the unions and that "thereafter these restraints were acquiesced in" by the leader-employers. Leader-employers attended Price List meetings and participated in the very formulation of prices and other restraints (Tr. 252-255, 257, 54-55, 10-11, 17-18). The evidence is that many leader-employers welcomed price-fixing. See the quotation from the Second Circuit's majority opinion, on next page, and Supplement to this Brief, pages S-1 ff , *infra.*

Even if the Unions here always took the initiative without protest from the employer-members, the latter's later acquiescence, and their ensuing combination to comply with and to enforce Union prices and other restraints are a sufficient "combination" within the meaning of the *Allen Bradley* rule. In *Allen Bradley,* too, the initiative came from the union and the District Court found that the non-member employers there had (as the employers here) practically no choice except to comply. In principle, the Second Circuit's reasoning here is fallacious. Under that

reasoning, a union which is more culpable, because it *originates* prices and other commercial restraints and then *persuades* or *coerces* employers to apply them, is guiltless under the Sherman Act. But a union which falls into line with original, employer persuasions or coercions similarly to violate that Act is guilty. It is the *combination* with non-labor groups, not the *origin* of the combination, which is and should be significant under *Allen Bradley*. That is why this Court's error in its majority decision in *Allen Bradley* as to who initiated the commercial restraints—an error pointed out by dissenting opinions—was not particularly important.

The Second Circuit's opinion actually contains language which itself recognizes both *conspiracy* and *combination* between the defendant Unions and non-labor groups:

> "* * * *there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies;* and there was no evidence offered by the appellants that such a group did not exist. *Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements.* Similar economic benefits to orchestra leaders are inherent in other of the unions' regulations, for example, the restrictions on traveling engagements." (372 F. 2d at 162, emphasis supplied; App. 192)

It is strange, in the light of the quoted language, that the majority below accepted the manifestly erroneous finding of the District Court that there was no unlawful *conspiracy* or *combination*, especially when one considers the *undisputed* testimony of both Union and non-union witnesses who testified that throughout the United States there is

and for many years was no competition between orchestra leaders (and booking agents who sell orchestras' services) at prices below the minimum prices set forth in AFM and Local Price Lists (Tr. 290-293, 274, 1133, 557, 449, 522-523, 536-538, 970, 996, 1001, 374, 1362, 2184, 10-11, 17-18, 151-152, 137-140). Surely such continued and universal compliance with AFM and Local Price Lists is "conscious parallelism," at the very least, not mere coincidence. It *must,* indeed be conspiracy, combination or arrangement between the Unions and leader-employers and booking agents in the market for musical services. The very nature of the acts perpetrated by the parties to the combination here manifest them as business restraints: price-fixing, suppression of competition between entrepreneur-leaders, monopolistic regimentation of and interferences with the businesses of entrepreneurs, numerous unreasonable burdens on commerce. Therefore, the mere acquiescence of businessmen in such Union prices and commercial restraints in these cases is enough to trigger antitrust law liability in the parties to the combination. *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208 (1939); *United States* v. *Masonite Corp.,* 316 U. S. 265 (1942); *Northern California Pharmaceutical Association* v. *United States,* 305 F. 2d 379 (9 Cir. 1961), certiorari denied 371 U. S. 862 (1962); *Ball* v. *Paramount Pictures, Inc.,* 169 F. 2d 317 (3 Cir. 1948). See the booker's license, AFM Bylaws, Plaintiff's Exhibit 162 pp. 165 ff, especially ¶ (f), p. 167.

There are very few cases which deal with employers or entrepreneurs as union members; probably because there are very few unions which tolerate either *employers* or *supervisors* as union members. It would seem, in principle, that membership of employer-entrepreneurs in the very union which has organized their employees is the *crême de la crême of combination* proscribed by the *Allen Bradley* doctrine, because the combination enforces or applies minimum prices and prevents competition below those prices. What is true of prices and price competition in this respect

is equally true of the numerous other types of monopolistic practices which the record attributes to the "combination" in these cases. See this Brief, pages 94-99.

Union regulations (App. 93-94) fix the minimum "leader's money" or remuneration (profit) (Tr. 137, 249) and they insulate leaders from competition by other leaders at prices below the minimum prices fixed (Tr. 290-293) by the Unions. It does not matter who first thought up and *instituted* these unlawful business restraints. They are enforced *by the Unions in combination with leader-employers* and other non-labor groups, especially booking agents. In this connection, Judge Anderson, for the majority in the Second Circuit, makes the word "unilateral" bear too great a burden. The Record shows that the "Price Lists", which are Union bylaws (App. 93) and which prescribe the Unions' minimum prices and their suppression of competition below those prices, originate from "Price List" meetings. With one exception (Plaintiffs' Exhibit 219), during all of the time covered by the complaints herein, orchestra-leader-employers attended those Price List meetings and participated in the deliberations which resulted in the Unions' minimum prices and suppression of competition. Thus, the words "unilateral" or "unilaterally" are ambivalent in this connection. It is correct and accurate to say that *the Union unilaterally* fixes minimum wages; because what the Price List meeting does (or what the Executive Board of Local 802 does) is later promulgated by the Union as the act *of the Union*. However, the process of fixing prices *before their formal promulgation as Union bylaws* involved leader-employer participation in their formulation and collaboration of the Union with leader-employers at Price List meetings. In that sense, precisely because leader-employers thus actively collaborate in the fixing of prices, it is somewhat ambiguous to speak of the Unions' *unilateral* price-fixing and suppression of competition.

Judge Anderson accepted the District Court's finding that there was no *conspiracy* between the Unions and the

leader-employers to restrain trade and to fix prices. Maybe there was no "conspiracy" in a technical sense, or in a sense that those who participated in the Price List meeting (including leader-employers) were conscious of an unlawful objective. But there was most certainly *combination* and *arrangement* between the Unions and the leader-employers both at the stage when minimum prices *were being formulated* and at the stage where minimum prices and competition suppression *were enforced.* However, the actual promulgation of the Union bylaws imperating suppression of competition at prices below the Union-fixed prices was a unilateral Union action, even when it was the result of action by the Local 802 Executive Board.

Therefore, the undisputed evidence in the Record contradicts the finding of the Courts below that there was no conspiracy or combination between the Unions and the leader-employers to restrain trade, to fix prices and to suppress competition.

The professional orchestra leaders in the class here involved are businessmen. The fact that they acted as a group in collaboration with the Union should not obscure the further fact that they worked together within their group or class for the purpose of aiding enforcement of minimum prices and for the purpose of suppressing competition. Indeed, if they merely acquiesced in those prices and in the other Union arrangements for the suppression of competition, their combination, arrangement or conspiracy in violation of the antitrust laws would be clear (*Northern California Pharmaceutical Association* v. *U. S.*, 305 F. 2d 379, 387 (9th Cir., 1961), cert. denied 371 U. S. 862 (1962); *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208 (1939); *Local 175 International Brotherhood of Electrical Workers* v. *U. S.*, 219 F. 2d 431 (6th Cir.), certiorari denied, 349 U. S. 917 (1955); *U. S.* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960); *U. S.* v. *Milk Drivers Union*, 153 F. Supp. 83 (D. Minn. 1957).)

5. *App. 195:*

> "Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a 'term or condition of employment', they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for 'labor disputes'; it does not provide a blanket exemption."

In this connection, cross-petitioners make two comments:

(1) The combinations here involved coerce orchestra-leader-employers with respect to *many additional things, other than price-fixing,* which, on their face and essentially, are not "terms or conditions of employment". See, for example the 54 items appearing at pages 94-99 of this Brief. Indeed, the AFM Bylaws are very largely given over to matters which in no sense are such "terms or conditions". According to defendants' own admissions, these bylaws are generally enforced as written (Tr. 151-152); and they are enforced by defendant Unions (Tr. 20-21, 25-26, 166-167, 151-152) and by leader-employers (Tr. 8). It is inconsistent to exempt from the Sherman Act only price-fixing by the combination because price-fixing is not, admittedly, a "term or condition of employment"; and then to fail to exempt *other monopolistic conduct* of the same combination, even though that other conduct is equally neither a term nor condition of employment.

(2) The Norris-LaGuardia Act does not, under proper and reasonable construction, afford immunity from liability under the Sherman Act in every "labor dispute" excogitated by an interested union. As pointed out above, this would mean not a reconciliation or harmonizing of the two Acts, but a supplantation of the Sherman Act by the

Norris-LaGuardia's literal (and in some contexts quite irrationally inclusive) definition of "labor dispute". That definition is in many respects the key to the statute. The courts have been forced, therefore, even as early as the 1930's, to modify the rigid literalism of the definition by rules of reason: *Oberman & Co.* v. *United Garment Workers Union,* 21 F. Supp. 20 (D. C. Mo. 1937); *California State Brewers Institute* v. *Teamsters,* 1-A LRRM 661; *Waterfront Employees of Portland* v. *C.I.O.,* 1-A LRRM 568; *Feht Baking Co.* v. *Bakers' Union,* 20 F. Supp. 691 (D. C. La. 1937); *Donnelly Garment Co.* v. *International Ladies Garment Workers,* 21 F. Supp. 807 (D. C. Mo. 1937), reversed on jurisdictional grounds, 304 U. S. 243 (1938) and 20 F. Supp. 767 (D. C. Mo. 1937); *Retail Food Clerks* v. *Union Premier Food Stores,* 98 F. 2d 821 (Cir. 8, 1938); *Grace* v. *Williams,* 96 F. 2d 478 (Cir. 8, 1938); *Dean* v. *Mayo,* 9 F. Supp. 459 (D. C. La., 1934), affirmed 82 F. 2d 554, *Pauly Jail Building Co.* v. *International Association,* 29 F. Supp. 15 (D. C. Mo. 1939).

It would take no great ingenuity for any labor union leadership interested in unlawful combinations forbidden by *Allen Bradley* to invent a "labor dispute" for the very purpose of making the rule of that case ineffectual. That would be the triumph of literalism over the true administration of justice and a reversion to sterile conceptualism and nominalism as canons of statutory interpretation. It would give a magic efficacy to an incantation, "labor dispute".

6. *App. 200-201:*

> "A closed shop dispute * * * concerns a term or 'condition of employment' and therefore is exempt. * * * As a union's pursuit of a closed shop is protected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act."

A closed shop is *not* a legitimate term or condition of emment, since it was banned in 1947 by the Taft-Hartley Act.

Therefore a union's pursuit of a closed shop is not protected; and the accomplishment of that unlawful objective should, in the context of these cases, be declared a violation of the Sherman Act. Moreover, the Second Circuit seems erroneously to reason that a "term or condition of employment" is *ipso facto* exempt under the antitrust laws, regardless of the legality of the term or condition involved.

Furthermore, the closed shop, whenever it was lawful in decided cases, never involved (except in the instant Unions) coercion of the *employer* into any union; least of all into the same union with his employees. This fact, alone, would differentiate the present case from any precedents cited by the Second Circuit.

7. In considering the Unions' refusal to bargain with orchestra leaders and their activities in putting pressure on orchestra leaders to become Union members, the Court of Appeals, it is respectfully submitted, committed a number of critical errors:

(a) It held that "Whether unfair labor practices were committed * * * must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel?" (App. 201). But no unfair labor practice was ever presented to the courts by plaintiffs, who very well understand that NLRB has exclusive jurisdiction over such matters. Plaintiffs contended that the defendant Unions' refusal to bargain with orchestra leaders, and their pressures on orchestra-leader-employers in combination or collaboration with non-labor groups, constituted exercises of predatory, monopoly power violative of the Sherman Act. In applying the Sherman Act, it is not necessary first to obtain a ruling from the NLRB. *Vaca* v. *Sipes* (87 S. Ct. 903, 914-915).

(b) "A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen.

Hunt v. *Crumboch*, 325 U. S. 821 (1945)." (App. 201-202). There is no requirement that there be a *conspiracy*. A *combination* or *arrangement* with non-labor groups is enough. There was combination in these cases. For example, there are so-called labor contracts between Local 802 and the hotels, nightclubs and restaurants of New York City. Orchestra leaders, not privy to such contracts or to the negotiations leading up to them. Nevertheless, leader-employers who play in hotels, nightclubs and restaurants are bound by that contract (Tr. 237-38; 276-78). See Cross-Petition for a Writ of Certiorari, § 9, p. 25 ff.

(c) "Moreover the purpose behind the Unions' action makes it apparent that there is no violation involved. Unlike *Hunt* v. *Crumboch*, * * * refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather achieving uniformity of labor standards" (App. 202). This statement contradicts undisputed evidence given by Max Arons then Secretary and now President of Local 802 (Tr. 3240, 3656-3657).

One of the obvious purposes and certainly one of the unavoidable effects of refusing to bargain and of forcing orchestra leaders into the Union was to maintain such a monopoly power *as would prevent collective bargaining about wages, hours and working conditions* and as would therefore leave wages, hours and working conditions to government by unilaterally promulgated Union bylaws, enforced in combination with many types of employers-businessmen. This manifest objective is coupled with one equally apparent: to eliminate from competition the non-union orchestra leader who was not subject to Union bylaws.

(d) "The exertion of pressure on orchestra leaders to join the Union reflects a legitimate Union concern for the closed shop. * * *" (App. 202). This somewhat inexplicable statement neglects the fact that the closed shop is unlawful

under Federal statute and that a Union concern for the closed shop cannot, therefore, be legitimate.

(e) "* * * and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, *e.g., Los Angeles Meat & Provision Drivers* v. *United States* * * *" (App. 202).

This, of course, *assumes* (against uncontradicted evidence in the record) that orchestra leaders do not present job threats to Union members. On the contrary, they are providers of jobs for Union members. See Cross Petition for Certiorari, § 10, pp. 26 ff; Brief in Support of Cross-Petition, pp. 15-19.

8. "The same leaders who are 'employers' in the club date field are very often employees when they perform as sidemen or subleaders or when in other fields the purchaser of music is actually the employer" (App. 202). However applicable the foregoing comment may be to hundreds of Union members *who improvise as orchestra leaders,* those comments have no application whatever to plaintiffs or to the full-time professional orchestra leaders constituting the class of persons who function as do plaintiffs. Here, again, the Second Circuit failed to read the record accurately insofar as it pertained to plaintiffs and to professional orchestra leaders like plaintiffs. The majority failed to take into account the fact that plaintiffs never work as sidemen, except Marty Levitt, who did so two or three times a year and then only as an accommodation for a fellow orchestra leader who suddenly needed a replacement. Perhaps the majority was misled by the concurring and dissenting opinion of Circuit Judge Friendly. Judge Friendly was at pains to give a description of "orchestra leaders" which generally had absolutely no relevance to the plaintiffs or to the class represented by plaintiffs:

"* * * Beginning with the single sideman leading himself, this ranges through the sideman who picks up

> two or three engagements a year [like Max Sontag] as leader of a larger group, the performer who spends a fair portion of this time as leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time, up to the few leaders who have ceased to lead at all. Obviously, this means a high degree of interchangeability in work functions and competition among Union members for posts as leaders." (App. 204)

Whatever the accuracy of this description to others it has no application whatever to the plaintiffs or to the class represented by them. None of the plaintiffs is interchangeable with sidemen or vice versa. Nor is there any competition among Union members for posts as leaders which can lawfully be protected by Union action. The Union simply has no business to attempt to protect competition between leaders for jobs, *i.e.*, engagement contracts, as leaders. Nor does it have any business to protect sidemen-turned-leaders when they seek to compete as leaders with other orchestra leaders.

9. *App. 196:*

> "Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the union's protective provisions do not, as in *Jewel Tea*, appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

Jewel Tea was the product of collective bargaining, which defendant Unions here have always spurned and eschewed. How, then, can the policy considerations be the "same" for the purposes of appraising, against "labor

dispute'' criteria, the defendants' bylaws and activities? How can *dictatorial imposition* of ''terms and conditions of employment'' be equated to elaboration thereof by *collective bargaining?* There could be a question whether a collective agreement amounts to exercise of monopoly powers by the contracting parties, where they confined *their bargain* to mandatory subjects for bargaining. There appears to be no question whatever about the monopolistic character of defendant Unions' combination with non-labor groups in these cases, where the Unions join with businessmen (who are Union members) for the purpose of autocratically *imposing* all sorts of economic conditions *as well as* wages, hours and working conditions, without dealing with such businessmen in any way except as Union-employer-*members* (who are always outvoted by employee-members).

The Second Circuit, after measuring the Unions' conduct by ''labor dispute'' criteria, concludes, rather irrelevantly in view of the utter absence of collective bargaining in these cases:

> ''Thus, in the absence of an illegal conspiracy, mandatory subjects of collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the workingman.'' (372 F. 2d at 165; App. 153, #123)

That conclusion is surely inappropriate here, where the parties were not at all free to reach an *agreement,* since the leader-employers were robbed of such freedom by unilateral bylaws covering (i) mandatory subjects of bargaining; (ii) non-mandatory subjects of bargaining and even (iii) lawfully impermissible subjects, *e.g.,* price fixing. The Court's quoted conclusion completely neglects even the unmistakable combinations both between union and employer groups and among employer-businessmen *inter se.*

The Court correctly finds that under the "labor dispute" test, price-fixing is outside the scope of proper union function. The decision of the Court below also validly distinguishes the *Oliver* case from the instant cases (372 F. 2d at 166):

> "The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of 'contracting out'. (372 F. 2d at 166)

However, two pages later (372 F. 2d at 168) Judge Anderson, suggests against undisputed facts in the record, that professional orchestra leaders like plaintiffs are "job threats" to Union members. Therefore he concludes that pressure on orchestra leaders to join the union reflects a legitimate(!) labor interest in a closed shop, "and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members" (372 F. 2d at 168). This suggestion is totally inconsistent with his earlier finding that job competition or other relationship between leaders and sidemen or sub-leaders cannot justify price-fixing. The Union regimentation of business decisions and functions properly belonging to leader-employers is often completely unrelated to "terms or conditions of employment". The economic or other benefit which many leaders derive from their Union affiliation makes the very structure of the Union and not just its price fixing activity, subject to attack under the antitrust laws. Membership of leaders

in the Union, whether voluntary or coerced, stifles competition in a wide range of business functions and limits the economic freedom of leaders as businessmen, which the Sherman Act protects.

10. *App. 200:*

"* * * local unions have a direct interest in protecting the job market for their workers, cf. *Rambusch Decorating Co.* v. *Brotherhood of Painters,* 105 F. 2d 134 (2 Cir.), cert. denied 308 U. S. 587 (1939) * * *."

(1) The *Rambusch* case came (in 1939) long before Congress (in 1947) imposed on unions the duty to bargain collectively. In any process of harmonizing texts of partially inconsistent statutes that duty to bargain ought to be considered now, even if it could not be a factor in 1939. For a union today to fix even minimum wages by means of enforced bylaws is to prevent or to hinder collective bargaining.

(2) In any event, the *employer* in *Rambusch* was not included in the union's bylaws fixing minimum compensation. Defendant Unions here fix minimum compensation for *employers* and employees.

(3) Even if unions have a direct interest in protecting the job market *"for their workers"*, they do not have a proper interest in protecting the "job market" *for employers.*

(4) The Unions' interest "in protecting the job market for workers" does not exempt them from the duty under NLRA to bargain, nor from the duty under the Sherman Act to avoid price-fixing, suppression of competition, etc., in combination with non-labor groups.

11. *App. 195 and 200:*

"As neither the travel restrictions nor the employment quotas were instituted in furtherance of a con-

spiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act."

This reasoning flies in the face of the undisputed facts in the record, many of which are evidence supplied by defendant Unions. Besides, the Union travel restrictions and employment quotas here are not isolated phenomena. They are a part of a system of regulations and combinations with non-labor groups which, taken as a whole unmistakably violate the Sherman Act as construed in *Allen Bradley.*

It is obvious, for the same reasons that made the doctrine of "conscious parallelism" a reasonable part of antitrust law, that travel restrictions and employment quotas could not possibly be effective or even significantly observable in the market for musical services (where they are widespread), unless they were imposed and complied with by many combinations between defendant Unions and non-labor groups. This rational induction or deduction from undisputed and indisputable record facts is supported by much testimony (Tr. 89-90, 146, 163-166, 237-238, 274, 278, 295, 374, 449, 464-465, 469-473, 522-523, 772 ff). As to travel restrictions the combination is between the Unions and leader-employers (Tr. 163-166, 237-238, 278, 449, 457, 1102) and booking agents (Tr. 522-523, 557, 996-1001, 1102-1105, 2505-2506). As to employment quotas, the combination is between the Unions and leader-employers (Tr. 8, 457, 469-473, 772-773, 1001, 2338-2339, 2348, 2357, 2404 ff), hotels (Tr. 278, 464-465, 469-473, 895, 2205-2206, 2215, 2338-2340, 276, Plaintiffs' Exhibit 241), and caterers (Tr. 772-773, 2348, 2357, 2404-2405).

Nor are the travel restrictions here, except by self-interested union nominalism, properly designated by defendant Unions as "terms or conditions of employment." Real "terms or conditions" must be bargained, or at least there must be a good-faith attempt to bargain them by the

Unions, if there is to be exemption from the Sherman Act because of the Norris-LaGuardia Act. Most of the travel restrictions, and all of the minimum quota rules here, are also *price-fixing* rules, or regulations to suppress or to regiment competition between leader-entrepreneurs. (Plaintiffs' Exhibits 178-185). It is also pointed out below respecting travel restrictions. Both of these two types of Union regulations necessarily increase the leader-entrepreneur's profit and therefore the price to the public. The apparently similar union rules in the cases cited by defendant Unions and by the Courts below are not really the same. The court cases on union employment quotas came, mostly, before unions were required to bargain about such matters. They never included the *employer* in their prescribed quotas, as do all of the Union rules here on "minimums" (See Plaintiffs' Exhibits 178-185). Inclusion of the leader-employer in these Union bylaw "minimums" necessarily means inclusion of the *employer's* profit in the price.

As to travel restrictions, none of the cited cases involved unions which invited or coerced employers into membership or which were trying to protect both *employers* and employees against the respective kinds of competition affecting them.

Employment quotas were instituted and maintained by the Union-employer combinations here in the only way which could have made them effective: by and for combinations between the Union on the one hand and orchestra-leader-employers, hotels, nightclubs, restaurants, caterers and booking agents on the other hand. Employment quotas, as put into practice by the Unions, always benefited orchestra leaders by increasing their profits. Part of the quota being the leader himself, the purchaser always had to pay the "leader's fees" or profit (App. 103-104, Nos. (17) & (18)). It is uncontradicted that the AFM travel restrictions, set forth in AFM bylaws were instituted partly

for the purpose of preventing competition with local orchestra-leader-employers and their employees.

12. The Court of Appeals regarded the Union *travel restrictions* and *employment* quotas as quite different from Union price-fixing, "* * * because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market" (App. 200). But neither Union interest in the job market nor the fact that travel restrictions and employment quotas are mandatory subjects of collective bargaining justifies or excuses violation by the petitioning Unions of the Sherman Act *in combination with non-labor groups.* In the first place, whether something is or is not a *mandatory subject of collective bargaining* has no possible relevance here, since admittedly defendant Unions never engage in collective bargaining with leader-employers (Tr. 26). In the second place, the *Allen Bradley* case reflected definite union interest "in maintaining the job market." But that did not prevent this Court from striking down its combination between the union and the businessmen to flout the antitrust laws. In the third place, no cases justify the kind of employment quotas mandated by the Union bylaws. The cases which regard employment quotas as "terms and conditions of employment" or as mandatory subjects of collective bargaining, concerned employment quotas from which *employers* were *excluded.*

13. The Second Circuit also erred in reasoning as follows:

> "* * * since the employers do not remain within the jurisdiction of any Local when they are traveling, the only realistic way to achieve Local security is through the enforcement of restrictions of the national union." (App. 200)

This neglects the obvious facts that *collective bargaining* is a realistic way to achieve "local security"; and that

collective bargaining is something the defendant Unions never tried. Moreover, even if it be true that only enforcement of national union restrictions is realistic, such enforcement of the Unions' unreasonable restrictions on interstate commerce, in combination with non-labor groups, becomes unlawful when it is aimed at or when it results in protecting local orchestra-leader-entrepreneurs from competition by other orchestra-leader-entrepreneurs hailing from different Locals.

Moreover, the issue does not concern merely *unqualified travel restrictions* but whether the nation-wide traveling restrictions imposed by AFM are or are not *reasonable burdens on interestate commerce.* There may be cases which show that specific union travel restrictions are not unreasonable burdens. They do not answer the question whether the cumulative, extensive and complicated burdens imposed by AFM on orchestra-leader-employers are or are not unreasonable (e.g., Tr. 162 ff; 146-51).

14. *App. 201:*

> "The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wage scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege."

The Court here neglects the extensive, important and undisputed evidence which shows that the Form B contract is primarily a means *for enforcing Union prices,* and other commercial restraints (all contained in Union by-laws incorporated by reference in the text of each Form B contract), in addition to unilaterally mandated wages and working conditions. Besides, to say that the Form B con-

tract is "primarily a reporting device which enables them [the Unions] to insure against violations of wage scales *and other regulations,*" means little unless those "other regulations" are reviewed in this connection. The face of the Form B contract (Defendants' Exhibits Z) demonstrates that the "other regulations" are bylaws fixing minimum *prices.* The price of the engagement is reported (Tr. 669-670, 1633) in the Form B contract, which contains a false designation of the purchaser of the music as "employer" of the orchestra, and which explicitly incorporates, by reference, all AFM and Local bylaws (including those which offend antitrust laws)! These do restrain trade.

15. *App. 201:*

> "The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§ 8(b)(3) and 8(b)(4)(ii)(A), 29 U.S.C. §§ 158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel."

As pointed out earlier, these "charges", when augmented by the unlawful combinations to which defendant Unions are parties, also constitute allegations of *prima facie* violations of the Sherman Act in the light of *Allen Bradley.* The Courts, therefore, not the NLRB, should, in the first instance and later, consider them, since the NLRB has no jurisdiction over antitrust matters.

16. *App. 202:*

> "* * * each time a non-union orchestra leader performs, he displeases a 'union job' with a 'non-union job'." (Citing *Milk Wagon Drivers' Union* case.)

This egregious error of fact, law and reasoning neglects the uncontradicted and indisputable facts that:

(1) Employers have no proper place in the very unions which have organized their employees. If "supervisors" were excluded by Congress from bargaining units, employers, *a fortiori,* should be. Congress apparently failed to make the exclusion in statutory language simply because unions which coerced employer-entrepreneurs into membership are as rare as mares' nests.

(2) Orchestra leaders supply union members with jobs (Tr. 352, 491-492, 702, 779).

(3) Unless the leader performed as such, he could not gain or maintain his reputation and clientele as an orchestra leader, and therefore he could not provide jobs for employee-musicians.

(4) The right of an employer to function *as such* is as deserving of protection under the labor laws as the right of employees to join unions. The employer's duties—where essential for the maintenance of his business—are not terms or conditions of employment (App. 99). As Simon says (*"The Big Bands"*):

> "Many of the big swing bands were built around the leaders and their instruments—around the clarinets of Goodman and Artie Shaw, the trumpets of Harry James and Bunny Berrigan, the trombones of Jack Teagarden and Tommy Dorsey, the tenor sax of Charles Barnet, the pianos of Ellington and Count Basie and the drums of Gene Krupa." (p. 4)
>
> "But of all the factors involved in the success of a dance band—the business affairs, the musical style, the arrangers, the sidemen and the vocalists—nothing equaled in importance the part played by the leaders themselves. For each band it was the leader who assumed the most vital and most responsible role. Around him revolved the music, the musicians, the

vocalists, the arrangers and all the commercial factors involved in running a band, and it was up to him to take these component parts and with them achieve success, mediocrity or failure." (p. 7)

That's the way it is in the music industry. Whether your band is a success, a failure or a mediocrity, to try to make bands function in some other way, *e.g.*, without leaders having the right to do what is for them idiosyncratic, is like making General Motors function without executives or with executives subject to union dictation as to what executives may do. This can't be done without killing the goose that lays the golden eggs of job opportunities for union members and others.

It must be noted that orchestra leaders are like many other employers who perform work which is in some respects *similar* to, but not the *same* as, their employees'. For example, employers who are lawyers, architects, jewelers, engineers, designers, plumbers, electricians, sculptors, painters, cartoonists, accountants, tax consultants, judo experts, stock brokers, real estate brokers, beauticians, factors, editors, store-keepers and many other businessmen, do work which is recognizably similar to that performed by their employees. Indeed, the work done by the executives of large corporations is similar in kind to that performed by many corporate employees in the higher echelons. In all these categories, the employees are often capable of doing some of the work actually performed by their bosses. But the indisputable facts just stated do not mean that the employees are interchangeable with the employers, or that unions representing employees have a legitimate union interest in preventing employers from doing work that employees may do in the areas of work characteristic of and essential to the employer's functioning as such.

Unions might and do have an interest in preventing supervisors and executives from working at production jobs, thus displacing production employees represented by those

unions. But unions have no right to interfere with or to limit employers and executives from doing what they must do to build and maintain their businesses.

All professional orchestra leaders do the four or five things quoted from Simon's book (*"The Big Bands"*) at pp. 24-25, *supra.* One of these is, most obviously, to *lead the orchestra,* either by playing an instrument or by waving a baton. For a union to try to stop either of these ways of leading under the pretext that "working orchestra leaders" displace employee musicians, is to prevent such leaders from doing their own essential and distinctive work—work which not only makes a success of the orchestra but also provides work for union members.

17. *App. 202:*

> "* * * Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform."

To say this is to misunderstand, radically, what an orchestra leader is; what the record says (without contradiction); what a competent and impartial expert like Simon says of orchestra leaders; and what any informed layman knows of orchestras and leaders. An orchestra leader *must* perform. If he is confined to managing, he degenerates into a mere business manager, a role which, however important, is by far second to the role of the orchestra leader. An orchestra leader *leads* or he is not a *leader.* He leads in two ways: by using the baton (or his arms), without playing an instrument or by playing an instrument in the manner described by Simon with respect to Count Basie (*"The Big Bands,"* pp. 85-86), as quoted above p.

Judge Levet's finding not only has no support in the record; it *contradicts* all the record evidence on this subject. Carroll was persecuted as a non-member, precisely

because he was not a member in good standing (Tr. 1771-1775, 294, 298, 3681-3684). Local 802 denied him musicians because he was a non-member (Tr. 165, 151-152). He could not do what a leader does most typically; he could not *lead* (Tr. 1937, 298, Plaintiff's Exhibit 355). Union bylaws penalized him as an expelled member (Plaintiff's Exhibit 162, p. 106 § 2, p. 87 § 5, p. 87 § 7). He had to replace himself as a leader (Tr. 1775-1781). What was true of Carroll was true of all non-member leaders. See *Cutler* case, 164 NLRB No. 8.

If Carroll's efforts to avoid persecution by rejoining the Unions were rebuffed, that was merely for the predatory purpose of punishing Carroll (*Carroll* v. *Associated Musicians*, 206 F. Supp. 462; Plaintiff's Exhibit 355) and of holding him up as a horrible example of what happens to leaders who kick over the Union traces.

18. *App. 202-203:*

> "Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to caterers. But the appellants have not shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1959)."[10]

The "terms and conditions" thus referred to are quite irrelevant, since they properly imply collective bargains and collective bargaining, which are non-existent for orchestra leaders. Is it necessary to show an injury where

the plainest inferences from record evidence spell out such injury? Admittedly, under Union bylaws, leaders may not solicit business from caterers and the latter may not hire leaders and their bands (Tr. 3248-3250). Is not this a restraint of trade which on its face imports injury, reduction in engagements and loss of business? Despite Union bylaws, the record shows that some orchestra leaders paid caterers substantial fees for the caterers' promise to recommend them to patrons of the catering establishment (Tr. 2355-62). Surely other might constitute an unfair labor practice, is also this is some measure of loss to other leaders.

POINT II

(Addressed to Question 2)

The restrictive Union practices of which plaintiffs complain are enforced and maintained by petitioning Unions in combination with non-labor groups. Therefore, they constitute antitrust law violations, whose resemblance to unfair labor practices is irrelevant.

A. As was explained above, combination between the petitioning Unions and employer-businessmen is inevitably and inextricably involved wherever price-fixing, as here, is effective as a market reality (App. 93-99).

These employer-businessmen are the following: collaborating leader-employers (Tr. 706), booking agents (Tr. 996), personal managers (Def. Ex. CM, Art. 25), hotels, restaurants and nightclubs (Tr. 60, 881 ff), TV and radio (Tr. 2255), caterers (Tr. 2404-2407), recording companies (Tr. 62, 420-422, 1491-1492, 1533, 2779, 3596, 3597, 430-432, 3551, 2699, 1069, 1536-1542), steamship companies (Tr. 1859 ff), many varieties of purchasers of music (Tr. 1144 ff, 2082, 2447), advertising agencies (Tr. 80), motion picture companies (Tr. 2984 ff), transcription companies (Tr. 2954), Class C places using steady engagements

(Tr. 3572-74, 3492, 1694, 689, 3495), theatres (Tr. 3351-55), music publishers (Tr. 2984 ff) and arrangers (Plaintiffs' Exhibit 195).

B. The Court below (372 F. 2d 155, 167) concluded that certain conduct of petitioning Unions cannot become factual ingredients of antitrust-law violation (along with *combination with non-labor groups*), because these ingredients appear to constitute *unfair labor practices* under the NLRA (App. 200).

Cross-petitioners contend that, under the *Allen Bradley*[19] rule, the same Union conduct which spells out an unfair labor practice under the NLRA can also, under the antitrust laws, articulate monopolistic and restrictive practices violating the Sherman Act, *provided they are committed in combination with non-labor groups*.

The petitioning Unions have violated the Sherman Act along two distinguishable lines of activity:

(i) Activity which, even though under one aspect or another it might constitute an unfair labor practice, is also monopolistic activity violating antitrust laws, executed *in combination with non-labor groups* (an ingredient which is irrelevant to the existence of an unfair labor practice).

At least six different species of Union activity fall into this line:

1. *Union regimentation or coercion of employers (orchestra leaders) requiring them to become and remain members of the same AFM Locals which have organized their employees* (App. 93-96). This could not possibly happen without combination or arrangement between the Unions and many leader-employer-businessmen (Tr. 8, 129, 164-65, 1427, 1775-81; *Doerner-Glasser* cases, 165 N.L.R.B. No. 110; Plaintiffs' Ex-

[19] *Allen-Bradley Co., Inc.* v. *Local 3, IBEW*, 325 U. S. 797 (1945).

hibit 246). The attorney for cross-petitioners has been unable to discover *any* unions (outside AFM and its Locals) which have or exercise monopoly power, as complete as petitioning Unions, to force the vast majority of employers in an industry into union membership. Orchestra-leader-employers are one of the largest groups of employers in the musical industry. All of them have been coerced or required to become Union members, in the same Local which has organized their employees. A clear Congressional intent, explicitly expressed in the NLRA, to exclude "supervisors" from bargaining units should not permit *employers* in such units. But AFM and its Locals have, and exercise, monopolistic power such that they have organized (and thus they combined with) practically *all employers in the musical field; i.e.,* orchestra-leader-employers who willingly or with reluctance comply with AFM bylaws. In addition, the Unions regiment in great detail all booking agents in the musical field. They publish a long list (Plaintiffs' Exhibit 215) of such agents, sub-agents and personal managers as part of their regimentation. Exercise of such power for 30 or 40 years is an unmistakable exhibition of restrictive, monopolistic power and practice. Passage of the Taft-Hartley Act in 1947 in no way mitigated the extent or altered the quality of such monopoly power in violation of the *Allen-Bradley* rule.

2. *Refusal by the petitioning Unions, during the past 30-40 years, to deal or bargain with orchestra-leader-employers;* despite the fact that said Unions always purport to represent the employees of such orchestra leaders. When a union, in combination with non-labor groups, can impose its unilateral dictates upon most of the employers in an entire industry, without so much as dealing or bargaining, the exemplification of monopoly power and its exercise are shockingly manifest (Tr. 62-63; 26; 93).

3. *The petitioning Unions pretend to represent both leader-employers and their employees.* They have maintained this pretense for more than 30 years. Such conflicting and inconsistent "representation" (Tr. 3657-3660; 508) could scarcely be established or maintained over a national industry during a period of three or four decades unless it had been backed up by the exercise of monopoly power *in combination with many employer businessmen* (Tr. 26; *Cutler* case, 164 N.L.R.B. No. 8).

4. *Unilateral and effective establishment by petitioning Unions of minimum wages, hours and working conditions for every musical event in the entire musical industry.* Such a long-standing, nation-wide system of union prescriptions could not possibly obtain for 30-40 years, unless exercised in combination with many employer-businessmen who submit to Union dictation in these matters. (Plaintiffs' Exhibits 187-195, which are Local 802 Price Lists, 197, 198, 205, 206, 209, 264-269, 429).

5. *Imposition of closed shops throughout the United States, despite the Taft-Hartley Act's ban on closed shops beginning in 1947.* Certainly it demonstrates exercise of monopoly power for a union, in combination with many orchestra-leader-employers, to do with impunity what Federal law and agencies were in part established to prohibit. Again, closed shops could not possibly exist, as they do, throughout the musical industry, unless leader-employers complied with Union rules on the subject (*Doerner* and *Glasser* cases, 165 N.L.R.B. No. 110; Tr. 84, 161, 164, 895, 2205-06, 2344, 1706, 1469, 2348, 2314-15, 1102-05, 2086; App. 93-96).

6. *Unlawful exaction from leader-employers by the petitioning Unions (and by other AFM Unions) of dues and work taxes to the tune of millions of dollars annually.* This is nationwide evidence of the exercise of

monopoly power. Normally, unions which accept monies or other support from employers are properly called "assisted unions". In the instant cases, the petitioning Unions were for many years assisted and operated as such deliberately, with impunity and throughout the United States. (*Cutler* v. *AFM*, 231 F. Supp. 845, affirmed 316 F. 2d 546, cert. denied 375 U. S. 941 (1963).)

7. *Employer "domination" of those AFM Locals wherein elected officials are leader-employers* (Tr. 141-43). See footnote 21, p. 97 of this Brief, *infra*.

Each of the foregoing seven kinds of activity can be regarded in whole or in part as an unfair labor practice. With equal reason, each must be regarded as an exercise of sheer monopoly power in combination with employers and businessmen. This is especially true because the same Unions also engage in many additional activities which are unadulterated violations of the antitrust laws, without any connotation whatever of violation of the NLRA or any other labor law. This is apparent from the next section, listing in part the second line of objectionable Union conduct.

(ii) The following line of Union practices, is pure and simple violation of the antitrust laws:

(1) Price-fixing in combination (Tr. 252-257) with many employers and businessmen, as the Court below correctly found (Tr. 180-181, 264-270, 374, 419, 532-533, 557, 656-658, 662, 1061-1062; App. 93-94, 197).

(2) A Union system of pseudo-arbitrations (Tr. 118-120) foisted upon the whole industry by Article 9 of the AFM Bylaws (Plaintiffs' Exhibit 162). That system obligates employers, employees, purchasers of music, booking agents and others. Indeed, it could not possibly be made to work as it has been working unless leader-employers, employee-musicians, purchasers of

music, booking agents and others collaborated with the Unions to make it work (Tr. 118-121).

(3) Unreasonable burdens on interstate commerce, imposed by the petitioning Unions despite the fact that the cumulative weight of these burdens is enormous and very expensive to the public (Tr. 265-268, 1664-1666, 2549-2551, 286-287, 145, 280-285, 163-166, 270, 3405; App. 95-96).

(4) Unreasonable, restrictive regimentation by AFM bylaws and Local bylaws, of leader-employers and purchasers of music throughout the United States (App. 93-99). This regimentation is illustrated by footnote 11, above, and pages 94-99, *infra*. Still other types of regimentation are designed to prevent competition among orchestra leaders at prices below the Unions' minimum prices (Tr. 89-90; 164-65; 3653-3655; 290-294).

(5) Unilateral, arbitrary imposition of minimum-employment-quotas upon orchestra leaders and purchasers of music, with the necessarily implied cooperation of many employer businessmen. Such employment quotas necessarily increase prices to the public; because, under AFM and Local by-laws, the leader-employer himself is counted as one of the musicians to be reckoned in the Union's minimum quota. For example, the Grand Ballroom of the Waldorf Astoria requires, for certain functions, under Union bylaws, a minimum of twelve musicians. Whether the leader-employer leads his orchestra or not, he is regarded as one of the twelve. Therefore, his "minimum leader's money", which is required by the Union bylaws, must *always* be included in the minimum price charged to the client for the engagement. The leader-employer may not, under Union bylaws, waive this item of Union-decree minimum profit for the leader (Tr. 104-105, 275, 3237, 137, 249, 457, 464-465, 469-473, 772-773, 1700-1701, 1722-

1723, 1976-1978, 2066, 2121, 2215-2217, 2338-2339, 2357, 2569, 2677, 2678; Plaintiffs' Exhibits 178-185, Minimums Booklets).

(6) Unreasonable restrictions on competition, imposed by the petitioning Unions on employers and purchasers of music, and enforced in combination with non-labor groups (Tr. 161-66, 151 ff. 146-151, 158-159).

(7) Rigid control over booking agents (Tr. 130-32) by an AFM licensing system under Article 25, AFM bylaws (Plaintiffs' Exhibit 162) to insure price-fixing and other commercial restraints.

(8) The imposition of mileage fees by Local 802, which must, under Union rules, be included in the price of the engagement. Since the mileage fee applies to the leader under Union rules (Tr. 270). The price is *pro tanto* increased. (Tr. 264-270.)

C. The Second Circuit erroneously thought (App. 200-201) that plaintiffs, in claiming that the Federation is an unlawful monopoly (in combination with non-labor groups), centered that claim on Union closed shop practices (Tr. 294, 2086, 1102, 1105, 2314-2315, 2348, 2205-2206) only. Actually, plaintiffs' claim of union monopoly was never so restricted before the Courts below. It embraced not only price-fixing (Tr. 10-11, 970), suppression of competition (Tr. 281, 389, 968, 1172, 1223) and unreasonable burdens on interstate commerce (Tr. 265-268, 1664-1666, 2550-2551), but Union practices like the following, all of which required, and in fact were carried out by, combination with non-labor groups (Tr. 8; 22-25):

(i) Requiring use, in all engagement-contracts between leader-employer and client, of provisions mandated by Article 34 of the AFM Bylaws.[20]

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[20] In this list, references to "AFM bylaws" are to Plaintiffs' Exhibit 162 and to Defendants' Exhibit CM, except where otherwise indicated.

(ii) Requiring use of the Form B contract (Defendants' Ex. CM; Article 13 § 33).

(iii) Applying and enforcing Article 25 of the AFM Bylaws concerning booking agents and other matters.

(iv) Requiring Union approval of all leaders' contracts for musical services with purchasers of music (AFM Bylaws: Article 16, § 1 and Article 17, § 1 (Tr. 656)).

(v) Restricting entry of non-Union orchestras and orchestra leaders into the field of musical entertainment (Tr. 1706, 1469, 1105, 895, 161, 298, 165, 2435, Plaintiffs' Ex. 187, pp. 66; Rule 24; Defendants' Ex. CM: Article 13, §§ 5, 7; Article 18, § 26; Article 25, §§ 4, 22; Ex. 165; Article 4, §§ 4, 5 (p. 45)).

(vi) Enforcing Article 16, § 1; Article 17, § 1 of the AFM Bylaws, requiring disclosure of the entrepreneur's *prices* and other trade secrets of employers.

(vii) Negotiating recording wage scales with four large recording companies in the United States (*Columbia, Capitol, Victor* and *Decca*) and thereafter imposing the contract and wage scales thus negotiated upon all other recording companies *and all orchestra-leader-employers,* who wish to make recordings (Tr. 58-63).

(viii) Coercing all orchestra-leader-employers to become members of defendant Unions and inflicting penalties (including refusing them Union sidemen) unless they remain members in good standing of defendant Unions (Article 13, §§ 5 and 7; Article 18, § 26; Article 16, §§ 2, 3, 4; App. 93-96).

(ix) Insisting that no orchestra leader be permitted to accept an engagement from any agent unless said agent is licensed by AFM (Article 25, § 4).

(x) Enforcing a bylaw forbidding orchestra leaders from directly or indirectly acting as a leader (and from making any contract or entering into service as such) with or for anyone, unless consent thereto is first given by the

Executive Board of the Local (Article 25, § 22; Article 4, §§ 4, 5 (p. 45); App. 97).

(xi) Creating the Executive Board's right, under Local 802 Bylaws, *to cancel a leader's contract with his client* if that contract fails to comply with Union "laws" (Plaintiffs' Exhibit CJ, p. 15; Tr. 1205-33; 1395-1425).

(xii) Requiring, from orchestra leaders who wish to make recordings of the performances of their orchestras, an AFM license, which AFM retains the right to refuse (Tr. 169-170; Plaintiffs' Exhibit 162, Article 24, §§ 6, 7).

(xiii) Using labor agreements between AFM or Local 802 and third parties as contracts which defendants enforce *against leader-employers* (Tr. 276, 295, 1238, 3563-64).

(xiv) Fixing and enforcing minimum employment quotas in a discriminatory and arbitrary fashion (Tr. 1700, 1722-23, 1976-78, 2066, 2121, 3243 ff; 3538).

(xv) Enforcing against AFM booking agents Union regulations which limit competition among orchestra-leader-entrepreneurs (Tr. 131-32, 546-47, 2007, 1238, 994 ff, 1091 ff; AFM Bylaws, Article 25, § 25-B, Third, (f)).

(xvi) Permitting some orchestra-leader-employers discriminatory dispensation from the obligation to use "Form B" contracts (Tr. 665-66).

(xvii) Arranging with caterers that they discriminate against non-Union orchestras (Tr. 772-73, 777-78).

(xviii) Using the spurious "arbitration" procedures imposed by Article 9 of AFM Bylaws (Tr. 118-21) under which AFM stands to gain financially by ruling against one of the "arbitrating" parties (Tr. 118-121, 20-21).

(xix) Dealing with the *largest* annual purchaser of music (all single engagements) in the United States (Tr. 2030), Samuel W. Rosenblum, Trustee, so as to cause discrimination in distributing engagements and in dispensing fees and wages for engagements under the *pretense* that

the leader-employer (along with the sidemen) is an "employee" of the Trustee (Tr. 2009 ff; 1574 ff; 3866 ff).

(xx) Asserting Union jurisdiction over "former members" (Plaintiffs' Exhibits 68, 69, 135).

(xxi) Requiring or tolerating racially segregated Locals for Negroes (Tr. 3645-46).

(xxii) Refusing to deal or bargain with leader-employers (Tr. 26-29; 93).

(xxiii) Applying to leader-employers labor contracts to which they were not privy and in whose negotiation they never participated (Tr. 60-63; 69-70; 81-82; 2581; 184; 237-38).

(xxiv) Arbitrarily regarding leader-employers as "employees" (Tr. 64, 3342-3347) of the purchaser of music, thus causing serious I.R.S. problems for leader-employers (Tr. 971-975).

(xxv) Permitting orchestra-leader-businessmen and employers to be elected officers of AFM (Tr. 141).[21]

(xxvi) Boycotting non-members on TV (Tr. 161).

(xxvii) Forbidding sidemen from playing with a leader-employer who is not a Union member (Tr. 164-65; App. 95).

(xxviii) Requiring AFM licenses for any entrepreneurs who want to make recordings (Tr. 169-70).

(xxix) Giving AFM supervision over prices to be charged to clients by leader-employer-businessmen (Tr. 180).

(xxx) Prohibiting "package" deals with caterers and hotels in the single engagement field (Tr. 3246, 3696).

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[21] Just before going to press on this Brief, the cross-petitioners were informed that the General Counsel of the N.L.R.B. is about to issue a complaint based on charges that defendant Local 802 is "dominated' and "assisted" in violation of § 8(a)(2) of the Act.

(xxxi) Incorporating price and wage rates and other standards in bylaws and printed booklets unilaterally published by defendant Unions (Tr. 53).

(xxxii) Limiting leader-employer's right to use the "corporate form" of doing business (Plaintiffs' Exhibit 162, Art. 25, § 21).

(xxxiii) Pretending that the leader hires his own sidemen as "agent" for the purchaser (Tr. 211) and that the leader is a Union "shop steward" (Tr. 3670-3671).

(xxxiv) Forbidding investments in shows by leaders (Tr. 289; Defendants' Exhibit CM, Art. 25, § 25).

(xxxv) Unilaterally changing Union bylaws so as to require changes in engagement contracts calling for price increases from the leaders' clients (Tr. 1853-1858a; App. 96, 98).

(xxxvi) Union prohibition forbidding caterers from hiring musicians (Tr. 3248-3250).

(xxxvii) Arbitrary classification of establishments (where music is played) by the Local 802 Executive Board (Tr. 1249).

(xxxviii) Union publications of expulsions of leaders with the purpose or effect of causing boycotts of such leaders (Tr. 3390).

(xxxix) Discriminatory allocation of engagement contracts by the City of New York on recommendations by Union leaders (Tr. 1581-1586; 1604).

(xl) Forbidding leaders on steady engagements from accepting single engagements (Tr. 2435).

(xli) Requiring a leader and subleader or two leaders where two bands alternate in the same room (Tr. 3321).

(xlii) Arbitrary Union conduct such as that which ended Peterson's Victor Herbert and Sigmund Romberg Musicales (Tr. 1980 ff) and which interfered with Carroll's performance in the Jade Room (Tr. 1709-1711).

(xliii) The Union claim of right to inspect leader-employers' contracts with their clients (Tr. 167, 3446, 214, 672-673, 641-643, 656, 3668). The real reason behind this claim is to enforce Union prices and price lists (Tr. 662, 658; App. 97).

(xliv) The Union regulations that all engagement contracts between leaders and their clients must incorporate Union bylaws and rules (Tr. 166-167, 3385; Plaintiffs' Exhibit 162, Art. 34).

(xlv) Union's claim of right to approve orchestra leaders (Tr. 296-297).

(xlvi) Union prohibitions of (a) *gratis* performances by orchestra leaders and (b) supplying singers *gratis* by leaders (Tr. 250, 139).

(xlvii) Union rules and complications concerning the splitting of orchestras by leaders (Tr. 162).

(xlviii) Union regulations and rates concerning augmented bands (Tr. 3729-3731).

(xlix) Union imposition on leader of the "benefits" of collective bargains negotiated "for him" by the Union (Tr. 3656, 3657).

(l) The Union pretense that the 8% surcharge is "part of scale" (Tr. 3674).

(li) The Union's unilateral, arbitrary method of changing classifications from Class C to Class A establishment (Tr. 3624, 689) and of requiring the Form B contracts for Class C houses which must be signed by the *owner* as "employer" of the musicians who perform there (Tr. 3572).

(lii) Forbidding its sidemen-members from performing in orchestras led by non-Union leaders (Tr. 165, 1937, 298, 3734-3738, 129-131, 1775-1881; App. 93, 95).

(liii) Forbidding leader-employers from owning other orchestras or owning a share in other orchestras.

(liv) AFM's pretention to the right to cancel leader-employer's contracts (AFM Bylaws, Art. 18, § 32).

POINT III

(Addressed to Question 6)

There is no relevant competition between professional orchestra leaders and their employee musicians.

The Trial Court's Finding No. 35 reads as follows:

> "Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58, DE, pp. 188-89, HE; F. F. 29)."

The Appendix gathers together and comments upon the pages of the Trial Transcript cited by the Trial Court; so that this Court can conveniently check the utterly inadequate factual foundation for the quoted Finding.

The Finding is radically based on two fundamental errors of reasoning and law by the Trial Court:

(1) The Trial Court neglected the indisputable fact that when a *sideman* bids for an engagement *as a leader,* he ceases being a sideman *pro tanto* (Tr. 212, 224, 3661-3662). He competes with other leaders *as an orchestra leader,* not as a sideman, when he books an engagement as an orchestra leader. When this sort of competition involves a *sideman who is trying to become a leader* on the one hand and an established orchestra-leader-employer with a reputation in his profession on the other hand, it may be very one-sided (and even negligible to the established leader). But if it is competition at all, it is competition for the same muscial engagement *by leaders,* or by a leader and a would-be leader, in which the Union has no right

to intrude. It is competition "to obtain jobs *as leaders*" (Supplement, *infra*, p. S-) or "to secure jobs *as leaders*" (p. S- , *infra*) as Mr. Arons put it. Indeed, Union bylaws forbid a sideman from filing a contract of engagement as such. He must file *as a leader*. Plaintiffs' Exhibit 162, Art. 16, § 5. See Defendants' Exhibit Z, the "Form B" contract. No leader ever competes with his sideman *qua* sideman for a job; and no purchaser contracts for a musical engagement with a sideman as such. This is true even if the sideman-turned-leader is only a leader *ad hoc* and *pro tem*. See Cross-Petition, Section 10, pp. 26-33; Cross-Petitioners' Brief, pp. 15-18; 18-19; Brief for Plaintiffs-Appellants in the United States Court of Appeals for the Second Circuit, pp. 69-72 (Tr. 3654; 3661-3662).

(2) But if it is competition at all, it is *competition for engagament contracts*, not for employee job opportunities. The cross-petitioners do not and never did identify themselves with the majority (Tr. 3667-3668) of the Local 802 members who, on occasion and sporadically, file contracts of engagement with the Union. That majority in Local 802 totals 8,000-10,000 according to variant testimony by Union officials (Tr. 212, 224, 3661-3662). In one year they filed 55,000 to 60,000 engagement contracts with Local 802 (Tr. 660). Cross-petitioners are concerned simply with the minuscule class of *professional* leaders, who like plaintiffs, have established businesses, who never or very rarely play as sidemen (and then only as an accommodation to a fellow orchestra leader) and who derive their livelihoods from working as orchestra-leader-entrepreneurs (Plaintiffs' Exhibit 58). Such leader-employers, are never really bothered by competition from sidemen, whom responsible and discriminating clients obviously will not choose for their weddings, bar mitzvahs, business socials, dinner music occasions, social dances, etc.

Professional leaders in Local 802 number less than 400 or 500. Their businesses are so well established that competition from sidemen who improvise occasionally as

leaders (usually for friends or relatives) is either entirely non-existent or is negligible and meaningless. *E.g.,* Max Sontag, whom the Unions trotted out as an "orchestra leader", admitted on cross-examination that he performed as a leader some nine times in three years! During the trial, *the Unions never produced as a witness a single professional leader with an established business as such or with a sufficient following to enable him to earn a livelihood solely as an orchestra-leader-entrepreneur!* No such leader could honestly testify in support of the Unions' artificial theses respecting competition, "employee" status, etc.

(3) The excerpts from the Transcript on which the District Court relied according to its Finding No. 35, furnish no support *whatever* for three statements in that Finding: (i) that sidemen "bid for the *same jobs* as full-time leaders such as plaintiffs"; (ii) that sidemen "perform the *same musical service* when they get a job" as leaders; and (iii) that they "also perform *in the same places as* full-time leaders." (emphasis added)

Not one single allegation of these alleged similarities appears in any part of the Transcript. Certainly, no such affirmation can be found in the excerpts cited by the Trial Court in its Finding No. 35, and collated in the Supplement to this Brief.

In a few instances, witnesses (none of whom were professional orchestra leaders) called by defendant Unions tried to leave the impression that they had bid against professional orchestra leaders like plaintiffs, on a few piddling occasions (Supplement to this Brief, p. S-1 ff). In doing this, some of the witnesses were manifestly relying on hearsay (Supplement, pp. S-9, S-11, S-12, S-13, S-14), vaguely remembered and diffidently asserted. In other passages, these same witnesses, who were largely professional sidemen without standing or reputation as orchestra leaders, testified that they had at times unspecified, alternated from the role of sideman to the role of

"orchestra leader", without having regular employee-musicians for their orchestras (Supplement, *passim*). The Supplement to this Brief quotes the testimony of these Union witnesses.

However, even if their testimony and their hearsay be taken as Gospel truth, the unassailable fact remains that they at no time enunciated anything whatever about "the same jobs", or "the same musical service" or the "same places". Moreover, when a sideman adopted the role of an "orchestra leader" on occasion, it was *in that role only* that he bid for jobs as a leader, that he obtained and filed with the Union an engagement contract, and that he performed the engagement. Thus, if there was competition, no matter how negligible, between these *ad hoc* and unreputed "orchestra leaders" and orchestra leaders like plaintiffs (who denied the existence of such competition), the said sidemen-turned-leaders competed to acquire "jobs as leaders", to use Mr. Arons' language (Supplement, p. S-15).

POINT IV

(Addressed to Question 7)

Orchestra-leader-employers who function like cross-petitioners constitute a true class under Rule 23 (a) (1) FRCP; even though the professional orchestra leaders in that class constitute only a very small group within the petitioning Unions.

The Second Circuit set forth these reasons for coming to the conclusion that no true class of professional orchestra-leader-employers exists:

(1) "* * * There is evidence that many orchestra leaders are willing members of the Union and subscribe to its policies" (372 F. 2 at 162; App. 192).

(2) "* * * the Unions' price-fixing programs would assure those who are less successful and well-known of earning at least the Union fee when they work instead of the

lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements" (373 F. 2d at 162; App. 192).

(3) "Similar economic benefits to orchestra leaders are inherent in other of the Unions' regulations, for example, the restrictions on traveling engagements" (372 F. 2d at 162; App. 192).

Cross-Petitioners respectfully submit that the foregoing three reasons are not and should not, in principle, be cognizable at law or in equity. Each of the three reasons presupposes an unlawful motivation against the Sherman Act, in those "many orchestra leaders" who are "willing members of the Union and subscribe to its policies." The fact that many leader-employers benefit from being members of AFM and benefit from its price-fixing does not and should not prevent professional orchestra leaders from being integrated into a true class under Rule 23(a)(1); any more than the existence of laborers (in a bargaining unit) who despise unions and who have no sympathy with the objectives of the NLRA, destroys the existence of a class of laborers.

It is true that many professional leader-employers are willing and cooperative members of AFM and subscribe to all its policies, both the legal ones *and the illegal ones,* like price-fixing and restraints on competition of the type which yields them advantages. Indeed, these facts are cornerstones for the cross-petitioners' case; they show that the Unions here do combine with (among others) many leader-employers to fix prices and to suppress competition. There could hardly be better evidence of the *Allen-Bradley* kind of *combination* than employer-entrepreneur membership in the Union, and all of the month-to-month collaboration which this entails.

But that *combination,* even where it includes the kind of diversity of interests to which the Second Circuit referred, does not negate or minimize the existence of a true

class of professional orchestra leaders. They, whether they prefer Union price-fixing or not, are nonetheless a class. The desire and interest of some members of the class to violate the Sherman Act by price-fixing and suppression of competition should not at law or in equity be entertained as evidence that a true class does not exist. At law or equity, the existence of a preference for unlawful Union activity like price-fixing and suppression of competition is not and should not be cognizable to discredit the class of professional orchestra leaders or to divide it in any way. Leaders who benefit from unlawful Union activities should not be heard to deny the class simply because they have different unlawful interests, which should not be recognized precisely because they are unlawful interests.

The foregoing considerations also apply where the leader-employers merely acquiesce in the Union program of price-fixing suppression of competition, etc., whether the acquiescence was reluctant, willing or merely the result of opinionless idolence.

CONCLUSION

The judgment of the Court of Appeals (Second Circuit) insofar as it reverses the District Court on the issue of price-fixing should be affirmed; and it should be reversed or modified to grant to plaintiffs the further relief sought in their complaints and in this Brief.

Respectfully submitted,

Dated: New York, N. Y., November 29, 1967.

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SUPPLEMENT

The Trial Court's citations to support his finding of "competition" between leaders and sidemen are as follows:

(Tr. 2291) Q. Have you observed them performing as leaders? A. Some as leaders, yes.

Q. And others as instrumentalists? A. Yes, sir.

Q. Have you observed any members of the CBS staff orchestra performing services on steady engagements at nightclubs or hotels? A. Yes, I have seen them.

Q. To your knowledge, have they performed services as sidemen? A. As sidemen.

Q. Have you seen any perform services as leaders? A. Yes, sir.

(Tr. 2553) Q. Mr. Cutler, in your entire experience as an orchestra leader can you recall that you bid for the same job against a sideman?

> Mr. Dannett: Objected to, your Honor. Against a leader I don't object.
>
> The Court: Overruled. Against another bidder who was a sideman.

A. I wouldn't know who bid on the jobs.

Q. Did you ever find out after you had lost a job who got the job? A. Yes.

Q. Did you ever find out that you had lost a job to a man who was primarily a sideman? A. Yes.

Q. When did that happen? A. It happens all the time.

Q. Did you ever find that you were bidding against a sideman as to job and income for a particular assignment?

> (Tr. 2554) Mr. Dannett: Objected to, your Honor.
>
> The Court: Sustained.

Q. On those occasions that you say that you were bidding against a person who eventually got the job even though

he was a sideman, do you know what the price was that he charged and what the price was that you charged? A. Yes.

Q. Was there a difference?

Mr. Dannett: If he had knowledge.

The Court: Yes, if he has knowledge.

A. There was a difference on some occasions, and there was no difference on others.

(Tr. 2570) Q. Mr. Cutler, you have lost bids to other leaders, have you not? A. Yes.

Q. Were some of those leaders to whom you lost bids musicians who on other occasions act as sidemen? A. I doubt it. I have no knowledge of that.

Q. And this morning when you testified that there were such bids which you did lose to leaders who ofttimes played as sidemen you were incorrect in so testifying?

Mr. Schmidt: I object to the form of the question because that is not what he testified.

The Court: Sustained.

Q. You do not know of any bid which you ever lost to a musician who also *on other occasions* acts as a leader? A. Not that I actually lost, no.

(Tr. 2571) Q. Do you know of any other leader who lost bids to musicians who on other occasions act as sidemen? A. I know that leaders do lose engagements to sidemen who may have a cousin or an uncle or someone, and they have an "in" on this particular job, maybe three or four a year, something like that. And in this respect leaders lose from the pool of engagements they may go after in the 802 jurisdiction. As a group, leaders do lose jobs to sidemen.

Q. And you do know that there are many musicians who are Local 802 members who on some occasions during the year act as sidemen and on other occasions act as leaders? A. There are some. How many there are, I wouldn't know.

(Tr. 2395) Direct Examination by Mr. Schmidt:

Q. Mr. Sherry, what is your present occupation? A. Catering.

Q. Do you operate a catering establishment under your own name? A. Yes, sir.

Q. Is it operated under your own name personally or under a corporate form which includes your name? A. Under a corporate form which includes my name.

Q. What is the name of the corporation? A. Sid Sherry Caterers, Incorporated.

Q. Where do you maintain an establishment for catering? A. 550 Ocean Parkway, Brooklyn.

(Tr. 2396) Q. Is there a name displayed outside that establishment? A. Yes.

Q. What is the name? A. Ocean Parkway Jewish Center.

Q. Are you also a member of Local 802? A. Yes, sir.

Q. How long have you been a member of Local 802? A. Thirty-seven—forty years.

Q. Are you a musician? A. Not at the present time.

Q. You were? A. Yes, sir.

Q. What was your instrument? A. Trumpet.

Q. How long did you act as a musician?

The Court: Or until when?

A. Until eighteen or twenty years ago.

Q. And since then you have been in the catering business? A. Yes, sir.

(Tr. 2411) Cross Examination by Mr. Dannett:

Q. With respect to one hundred patrons that you said used your facilities last year, how many different orchestra leaders played in your establishment last year, if you can tell us? A. Numerous orchestra leaders.

Q. Among the orchestra leaders who played was there a Max Sontag? A. Yes.

Q. Do you know Mr. Sontag? A. Very well.

(Tr. 2412) Q. Is he a person who also, if you know, of your own knowledge, acts as a sideman? A. Yes.

Q. Do you know of your own knowledge whether he acts more frequently as a sideman than he does as a leader A. Yes, he does.

(Tr. 2422) Q. Sometimes customers give you a list of leaders and ask you to recommend one from the list? A. Yes.

Q. Can you remember some of the names on such a list? A. May I say this to you, that this is a very common occurrence. It happens very often.

The Court: Please try to answer his question.
The Witness: I can't answer it.

Q. You mean you can't remember the names of any? A. No.

Q. But you can remember, you say, that these leaders sometimes act as sidemen? A. Yes.

Q. Did you see them act as sidemen? A. Yes.

Q. What were some of the names of the people you saw act as sidemen on one occasion and leaders on the other? A. This sideman, this saxophone player, the (Tr. 2423) blond fellow, what's his name, Max Sontag, is a sideman and he has worked in my place as a leader.

Q. Can you think of any other? A. Yes, if you give me a minute. There is a man who works for Herb Sherry and he was a leader in my place, Gene Long. I think that's his professional name. There are others, too, but I can't at the moment think of them.

Q. I think you also testified that on occasion there were some leaders or sidemen, I don't remember which, who played in your place and who before or afterwards appeared on TV? A. Yes. There are numerous musicians, the musicians who do our business are very competent and they can play any part of the business.

Q. Can you name us any who did play on TV? A. Yes. There is a fellow by the name of Willie Farmer, he has done very fine work, he worked in my place. He has done the TV shot, some other kind of higher class business, too.

Q. Is he a leader? A. Sideman.

(Tr. 2427) Re-cross Examination by Mr. Dannett:

Q. Do you know Willie Farmer? A. Yes.

Q. Who is he? A. A drummer, he lives in Newark, New Jersey. I know him for many, many years. As a matter of fact, I once worked for Willie Farmer in the Hurricane, many years ago.

Q. Does he perform services as a sideman? A. He was my leader at that time.

Q. He also performed services as a leader? A. Yes.

Q. This was in the club-date single engagement field? A. The Hurricane was a night club.

Q. That was a steady engagement, was it? A. Yes. I also played for Willie Farmer many years ago in the Latin Quarter, as a relief leader he was there, and I was a trumpet player for him.

(Tr. 2427A) Q. Do you know Abe Pizik? A. Yes.

Q. Who is he? A. A drummer, an old-timer. A very fine drummer.

(Tr. 2428) Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he always has and he has played as a leader as well.

Q. And that is also in the club date single engagement field? A. Yes.

Q. Do you know whether he performs musical services in any other field? A. I believe that Abe Pizik has played every part of the music business that there is to play.

Q. Do you know Victor Goldring? A. Very well.

Q. Do you know what instrument he plays? A. Saxophone, clarinet, sings.

Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he does, but mainly he is a leader.

Q. When he acts as a leader is that in the club date single engagement field? A. Yes.

Q. Does he perform musical services in any other field, do you know? A. I wouldn't know.

(Tr. 2429) Q. Do you know Max Epstein? A. He is my former partner.

Q. Does he play an instrument? A. Yes, he is a saxophone and clarinet player and violinist.

Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he does.

Q. Does he also perform services as a leader in the club date field? A. He was my partner and we were leaders.

Q. Do you know Willy Epstein? A. Very well. That is his brother.

Q. And Julie Epstein? A. That is his brother, too.

Q. And do they all perform in the same manner as does Mr. Max Epstein? A. Yes, I believe they do.

Mr. Schmidt: I ask that that last answer be stricken out, I believe they do.

The Court: Yes, strike it.

Q. Do you know whether they perform services in the club date single engagement field? A. They do.

Q. Do they also perform services as both sidemen and as leaders in the club date single engagement field? A. Yes, they do.

Q. Do you know Milton Lehr? A. A piano player, yes.

Q. Does he perform club dates in the single engagement field? A. Yes, he does.

Q. Does he perform services on some occasions as leader and on some occasions as sideman? A. The only way I can answer that, because I don't know at the present time what he is doing, I will have to go back a little bit. May I?

Q. Yes, please. A. Milton Lehr was my leader in the theatre. He conducted the show in the theatre, and I played for him in a vaudeville theatre.

Q. Did he also on occasion act as a sideman in any other fields? A. I believe he acts as a sideman in the club date field.

Q. Do you know Mr. Molina, Boris Molina? A. Yes.

Q. Does he play an instrument? A. Trombone.

(Tr. 2874) Q. Do you play an instrument? A. Yes, I play the piano.

Q. Have you in the past performed services as a leader? A. I have.

Q. As a sideman? A. Yes, I have.

Q. And as a sub-leader? A. Yes.

(Tr. 2875) Q. In what field have you performed such services as a sideman? A. In the club date field mostly.

Q. In what field have you performed services as a sub-leader? A. What we call the steady field, hotels, night-clubs, theatres.

Q. In what fields have you performed services as a leader. A. In the steady field, nightclubs, hotels, theatres.

Q. Will you please name some of the places where you have performed services in the steady engagement field. A. Sheraton East Hotel in New York, St. Moritz Hotel, the Little Club, the Azores Hotel in Long Beach.

Q. In those places, did you act as a leader or sideman? A. Leader.

Q. Can you name some of the places in the steady engagement field where you have performed services as a sideman? A. Gaslight in New York, 56th Street, private club, I can't think offhand. The Latin Quarter in New York, The Copacabana.

(Tr. 2889) Q. You previously testified that you did perform services in the club date single engagement field. A. Yes.

Q. Did you perform such services as a sideman only or as a sideman and leader? A. Sideman and leader.

Q. About how many engagements a year have you as a leader in the club date single engagement field? A. Not very many; maybe about a dozen.

Q. About how many engagements a year have you as a sideman in the club date single engagement field? A. It is hard to say, it is pretty often when I am out of work, that I will be a sideman.

Q. When you say you are out of work you mean you are not employed steadily? A. Yes.

The Court: When you are not employed as an orchestra leader?

The Witness: That's right.

The Court: Then you say you take jobs as a sideman?

(Tr. 2890) The Witness: With anybody, yes.

Q. Just to clarify that, you take engagements as a sideman in the club date single engagement field when you are not working in a steady engagement? A. That's right.

Q. How long was your engagement at the Sheraton East Hotel? A. About six months.

Q. How many weeks did you work at the Little Club? A. Four weeks.

Q. How long did you work at the Azores Hotel? A. Twelve weeks.

Q. How many weeks did you work at the Latin Quarter? A. I worked at the Latin Quarter on and off for about four years. I was rehearsal pianist there also.

Q. How long was your engagement at the Gaslight? A. About six months.

(Tr. 2893) Q. On how many club date single engagements have you played in the last two years?

Mr. Schmidt: As a leader?

Q. In any capacity, leader or sideman? A. In the last two years I would say in the neighborhood of maybe 75.

Q. On those 75 occasions did the leader supply the musicians with sheet music? A. Not to my knowledge, no.

Q. On those 75 occasions were head arrangements used? A. Yes.

Q. Have you performed services in the club date single engagement field for a leader by the name of Sontag? A. I worked a job with him about two years ago.

Q. Have you performed services in the club date single engagement field for Mr. Carroll? A. Yes, I played a job for Mr. Carroll this spring at the St. Regis Hotel.

(Tr. 2894) Q. Mr. Carroll is the gentleman seated here in court? A. Yes.

Q. Have you performed services in the club date single engagement field for Mr. Cutler? A. No, I never have.

Q. Do you know whether there was any occasion on which you bid for an engagement in which Mr. Cutler also put in a bid for the same engagement? A. Yes, there are two specific instances.

Q. Where did these occur? A. I played up at Darien, Connecticut, at the Weeburn Country Club. He was up there the week before I was up there, and I think he put in a bid for the engagement I was on.

Mr. Schmidt: I object and move it be stricken, "I think he put in a bid."

The Court: Yes, strike it out.

Q. Do you know? A. Yes, he did.

The Court: How do you know?

The Witness: The party told it to me.

Mr. Schmidt: I ask it be stricken as hearsay.

(Tr. 2905) Q. On those occasions what was the range in the number of sidemen you used? A. Anywhere from four to twelve.

Q. Did you select those sidemen? A. Yes, I did.

Q. How did you select them, from the union exchange floor? A. Called them on the phone or saw them personally.

Q. You did not use the union exchange floor? A. Yes, if I would be up there and saw them up there I would engage them. Otherwise I would call them on the phone if I didn't see them up there.

(Tr. 2906) Q. Included in these people that you used in the club date field when you served 12 times a year, as a leader, were these 5 or 6 men you regularly use whenever possible? A. Whenever possible, yes.

Q. How far back does this average of 12 club dates per year as leader extend? A. A good many years, I would say. Some years maybe less.

Q. What's the least in any year that you have had in the last five years? A. I would say five.

Q. And the most was 12? A. Yes.

Q. How many times in the last five years did the band total 12 pieces? A. I'd say in the last five years maybe 15 times.

(Tr. 3088) Q. Mr. Stevens, are you a member of Local 802? A. Yes, sir.

Q. For how many years have you been a member? A. Approximately 15 or 16 years.

Q. Do you play an instrument? A. Yes, I do.

Q. What instrument? A. The trumpet.

Q. Do you perform services in the club date single engagement field? A. Yes, (Tr. 3039) I do.

Q. Do you perform services in that field as a leader? A. Yes.

leads, have you not? A. Yes.

Q. Have you performed services in that field as a subleader? A. Yes.

Q. Have you performed services in that field as a sideman? A. Yes.

Q. Approximately how many jobs have you had as a leader in the last five years? A. If I say approximately 35 to 40 I think I would probably adequately cover it.

The Court: Each year?

The Witness: Last year it was a little less. It is more this year than last. Maybe last year I would say 25. This year possibly up to 40, and we hope the following year more.

Q. Just taking the year 1963 how many jobs did you perform services on as a sub-leader in the club date single engagement field? A. I would say 40.

(Tr. 3040) Q. How many did you perform services on last year as a sideman? A. 50.

Q. You also performed services as a leader on steady engagement in the Catskill Mountains? A. Yes.

Q. Did you perform such services last year? A. Yes.

The Court: You mean in 1963?

Q. This summer, 1964, and the summer before, 1963. A. Yes, sir.

Q. In connection with your engagements in the club date single engagement field do you on all occasions play the trumpet? A. Not on every occasion, sir.

Q. On what occasions do you not play the trumpet? A. At times, if possible, when the piano player may not know some of the chords of a certain tune when a girl is singing, or there is a special request, I may sit at the piano and play it.

Q. So you may play either the trumpet or the piano? A. Well, I also sing and that would come under the entertainment part.

(Tr. 3052) Q. Have you at any time bid for engagements which to your knowledge were also being bid for by Mr. Joseph Kaplan? A. Yes.

Q. On those occasions, to your knowledge, did you receive the engagement or did Mr. Kaplan? A. Well, there were instances where I remember specifically I did lose the date and another instance I got the date.

Q. Have there been occasions in which you bid for the same job that Mr. Benjamin Cutler was bidding for? A. Possibly. It is difficult to remember—

Mr. Schmidt: I ask that the answer be stricken.

The Court: Yes, strike it.

Mr. Dannett: May the witness finish his answer.

The Court: What is the question?

Mr. Dannett: The question is whether or not there were occasions when he was bidding for the same job.

The Court: Do you know?

The Witness: It is so difficult because we—

The Court: The question is do you know.

The Witness: Yes. There must have been.

(Tr. 3053) The Court: There were occasions?

The Witness: Yes.

Q. On that occasion, Was Mr. Cutler or yourself the successful bidder? A. I believe I was successful in that instance.

The Court: Was that one occasion?

The Witness: I remember this occasion because it was at the Americana Hotel. This I remember specifically.

The Court: When was it?

The Witness: I can't tell you exactly but I have in my brief case the exact date.

The Court: Can't you tell the year?

The Witness: Approximately a year ago.

Q. Have there been occasions in the past in which you were bidding for the same engagement that Mr. Peterson or Mr. Marty Levitt were bidding? A. I never came across Marty Levitt's name.

The Court: How about Peterson?

The Witness: I have come across his name.

The Court: When was that?

The Witness: Within a two-year period.

Q. Do you recall whether on those occasions Mr. Peterson or yourself was the person who received the engage-

ment? A. (Tr. 3054) Mr. Peterson received the engagement.

The Court: That was one engagement?

The Witness: I can't specify exactly. It is difficult to remember. The important thing I remember is the fact that I either got the job or lost the job. It is not too important who bid on the job against me.

The Court: On this occasion—

The Witness: I remember his name coming up in the conversation with the customer.

The Court: Who got the job?

The Witness: I think I lost the job. As I remember it I think I lost this particular job. It had to do with the Astor Hotel.

Mr. Schmidt: I ask that the answer be stricken.

The Court: Is that your best recollection or are you just guessing?

The Witness: That is my best recollection.

The Court: Let it stand.

(Tr. 3088) Q. You said that you bid against Mr. Cutler, Mr. Carroll and I think Mr. Peterson at one time or another? A. Yes.

Q. On those occasions, did you bid at prices below the minimum prices? A. Never.

Q. Did you bid at prices below the minimum prices fixed in the Local 802 price list? A. Never. They were wonderful competitors by the way because they would keep the price up.

Q. Did you at any time in your career in the last five years bid against any other orchestra leader at a price below the minimum price fixed in the Local 802 price list book? A. No. At this point, I came across sections where other band leaders would be bidding under scale which is quite prevalent in the Christian field. When I say "Christian field" I am denoting Christian weddings and

Christian affairs and there were many times when leaders would bid under scale.

Q. How would you know that? A. People would tell me. "You want $200 for four pieces. I can get a band for $100 for five pieces," and mention the name.

Q. In other words, the source of your knowledge is statements to you by these people who would say they could get a band at a certain price? A. That's right.

Q. You don't know whether they actually got the band at the price they named? A. I know of one specific instance where it happened just last week where I quoted the customer a price of $150 for three pieces.

(Tr. 3293) Q. Do you know of any musicians who perform in the club date single engagement field who also perform services for the Metropolitan Opera House? A. This fellow Abe Marcus has worked for various leaders like Marty White, and has been a leader in his own right during the summer in one of the mountain hotels. He is a timpanist in the Metropolitan Opera.

Q. Do you know of any musician who performs in the club date single field who also performs for the City Center Ballet or the City Center Opera? A. They do, because we just got through negotiating a contract for them and their work, and they have told me, their work is only a 15-week season and the balance of the season they come on the floor and obtain club dates as strolling violinists and bass players, et cetera.

(Tr. 3653) Q. Do you recall stating in that affidavit, Mr. Arons, "There is fierce competition among the rank and file members in their efforts to obtain jobs as leaders because the wage scale for conducting is considerably higher than for playing an instrument." A. Yes.

Q. Is it true there is any competition whatever among the rank and file members to obtain jobs as leaders at prices below the minimum prices fixed in the price book of Local 802?

Mr. Dannett: We have conceded that, your Honor.
The Court: Let him answer.

A. In what field are you talking. Club date field?

Q. The same field that you were talking about in this affidavit. A. Read it again, Mr. Schmidt.

Q. Here is the affidavit. A. That fact is correct.

Q. My question was whether as a matter of practice there is fierce competition or any competition? A. There is fierce competition.

Q. At prices below the minimum prices fixed in the Local 802 price list? (Tr. 3654) A. Not below.

The Court: Is that true in both steady and single engagements?

The Witness: In both steady and single.

Q. Do you recall in this same affidavit saying "Because every member of the union is free to accept a job as leader for a single engagement if he can get such a job, competition for the various jobs is assured." A. That's correct.

The Court: You say there was competition between leaders and sidemen to secure jobs as leaders?

The Witness: Every member in the club date field once he gets the contract, he is the leader.

The Court: Are you saying that sidemen as a practice submit bids to secure situations as leaders?

The Witness: Definitely, your Honor.

The Court: They submit bids for an orchestra to the single engagement purchasers?

The Witness: They certainly do.

Q. You mean by that that a man like Max Sontag submits regularly against a man like Tony Cabot? A. A man like Bob Kasha who submitted bids against Mr. Cutler was a sideman for Mr. Kahner, just the other day.

(Tr. 3666) Cross examination continued by Mr. Schmidt:

Q. Mr. Arons, you were giving testimony as to the exact number today of orchestra leaders in Local 802, do you recall that?

The Court: He did say perhaps, Mr. Jaffe would know more about this. Jaffe is going to testify.

Q. You recall yesterday I showed you Plaintiffs' Exhibit 341 for identification, your affidavit in the Cutler case? A. Yes.

Q. Do you recall using this language in that affidavit "Moreover even full time leaders such as Cutler who constitute at most 2 per cent of all leaders in (Tr. 3667) the single engagement field compete for jobs with the remaining 98 per cent who are employees" do you recall saying that? A. I did.

Q. When you used the word— A. Let me answer this question, you mean Mr. Sontag competes with Mr. Cutler, in that sense?

Q. I am reading your sentence here. A. They all compete.

Q. That isn't my immediate interest. I want to know whether that 2 per cent is 2 per cent of the 6,000 or 8,000 figure that you just gave us? A. I think the 2 per cent, there was an exhibit in the other case.

Mr. Dannett: It is in this case, your Honor.

The Witness: In this case, the first part of this case, where out of all those 6,000, I figured 120 and and Mr. Ashe corrected me by counting and saying there were 82 full time leaders.

Q. In other words, this 2 per cent that you are referring to here in this affidavit concerns only orchestra leaders who are full time leaders? A. Who never act as sidemen.

(Tr. 3668) Q. The figure of six or eight thousand that you mention comprises in the vast number of instances persons who play in both areas, that is to say who play as leaders and as sidemen? A. Leaders and also sidemen.

Q. The competition you spoke of again is competition always at or above the minimum prices fixed? A. That's correct.

Q. By the local? A. Correct.

Q. Do you recall executing in the Cutler case this affidavit dated October 29, 1963? A. Right.

Q. Do you recall stating in that affidavit as follows: "As shown, the Form B contract was adopted in order to achieve a legitimate union objective of securing in all cases the maximum Social Security benefits for the leader. Furthermore, it is a legitimate union objective to require all leaders to use a single contract, whether those orchestra leaders function in the manner of Cutler or whether they perform in the manner described in paragraph 6 of this affidavit, or whether they perform services in the steady engagement field", do you recall that? A. Yes.